Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-730

JOHN C. ROEMER, III, EDWARD E. DOERR, KENNETH A. STEVENS, and CYNTHIA KOONCE MILLER,

Appellants,

—v.—

BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND; MARVIN MANDEL, Governor; LOUIS L. GOLDSTEIN, Comptroller; JOHN A. LUETKEMEYER, Treasurer; WESTERN MARYLAND COLLEGE; COLLEGE OF NOTRE DAME; MOUNT SAINT MARY'S COLLEGE; SAINT JOSEPH COLLEGE; and THE ASSOCIATED PROFESSORS OF LOYOLA COLLEGE OF THE CITY OF BALTIMORE, INC.,

Appellees.

JURISDICTIONAL STATEMENT ON APPEAL FROM A UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

LAWRENCE S. GREENWALD
1200 Garrett Building
Baltimore, Maryland 21202
Attorney for Appellants

MELVIN L. WULF
American Civil Liberties
Union Foundation
22 East 40th Street
New York, N. Y. 10016
Of Counsel

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Appellees.

JURISDICTIONAL STATEMENT ON APPEAL
FROM A UNITED STATES DISTRICT COURT
OF THREE JUDGES FOR
THE DISTRICT OF MARYLAND

Appellants John C. Roemer, III, Edward E. Doerr, Kenneth A. Stevens and Cynthia Koonce Miller respectfully pray for plenary consideration of the questions presented, with briefs on the merits and oral argument.

OPINIONS BELOW

The district court issued majority and dissenting opinions on October 16, 1974. The opinions have not been reported, and are reprinted at pages A-1 to A-51 to the Appendix.

JURISDICTION

Appellants, plaintiffs below, contend that Maryland Annotated Code, Article 77A, §§65-69, as amended, is a law respecting the establishment of religion in contravention of the First and Fourteenth Amendments. The complaint prayed for injunctive and declaratory relief against the governor, comptroller and treasurer of Maryland, constituting the Board of Public Works, and five church-related institutions of higher education.

Jurisdiction was conferred on the district court by 28 U.S.C. §1331. A three judge district court was convened pursuant to 28 U.S.C. §§2281 and 2284. By a 2-1 decision judgment was entered against appellants on October 21, 1974.

Appellants filed their notice of appeal to this Court on October 25, 1974, in the United States District

Court for the District of Maryland. Jurisdiction is conferred upon this Court by 28 U.S.C. §1253.

STATUTES INVOLVED

The statutes involved are Md. Ann. Code, Art. 77A, §§65-69, as amended, sometimes called "the Act", reprinted beginning at page A-52 to the Appendix. A copy of the judgment is reprinted at pages A-57 and A-58 and the notice of appeal at page A-59.

QUESTIONS PRESENTED

I. Whether the Act is unconstitutional because continuing payments of undefined aid to church-related institutions and continuing state analyses to guarantee that aid is not used for religious purposes necessarily foster excessive government entanglement with religion or the potential therefor.

II. Whether the primary effect of the Act is to advance religion in the following respects:

A. Its failure to guarantee that state aid will not be used to advance religion.

B. Its financial support of classes in which prayer is regularly recited.

C. Its financial support of institutions which impose religious restrictions on faculty appointments and

perpetuate de facto religious restrictions on student admissions.

D. Its financial support of institutions whose secondary purpose is to encourage spiritual development and which require students to take a limited range of courses in theology and doctrine taught primarily or exclusively by clerics of the affiliated church.

E. Its financial support of sectarian institutions.

III. Whether, if the challenged legislation is unconstitutional, the appellee institutions should be required to refund aid received.

STATEMENT OF THE CASE

The Act, as originally enacted, contained no prohibition against use of state aid for sectarian purposes. The Court below held that the absence of such a prohibition invalidated the original Act. A-23. However, an amendment effective July 1, 1972, proscribed use of aid for sectarian purposes. Md. Ann. Code, Art. 77A, §68A; A-54. The court below upheld the Act, as thus amended.

The court below found that the appellee institutions were all church-related, and conformed closely to the colleges approved in Tilton v. Richardson, 403 U.S. 672 (1971). A-3, A-4, A-10, A-11. At four of the appellees, there is a practice of

starting classes with prayer. A-39. Some instructors wear clerical garb, and some classrooms have religious symbols. A-40. One appellee attempts to recruit to its faculty each year two members of a religious order. A-41. Two appellees favor members of religious orders as faculty, albeit for budgetary reasons. Ibid.

The district court found itself unable to characterize the manner in which theology and religion are studied at these schools. A-46. "However, a department staffed mainly by clerics of the affiliated church and geared toward a limited array of the possible theology or religion courses affords a congenial means of furthering the secondary objective of fostering religious experience." Ibid. To avoid excessive entanglement the district court held that state aid could not support theology programs. A-13.

All but one of the appellees have, or recently had, religious quotas for membership on the governing board. A-43. College catalogues reflected the religious affiliation of the college. Ibid. At the institutions affiliated with the Catholic Church, the great majority of students was Catholic, and at the one institution affiliated with the United Methodist Church, the largest single group of students was Methodist. A-44. Religious exercises are held on the campuses of all appellees, though attendance is not required. Ibid. The chaplain at each appellee is a clergyman of the affiliated church. A-44, A-45.

Moreover, all of the appellees have as a secondary objective the encouragement of spiritual development of its students. A-45.

The challenged legislation "provides public aid in the form of non-categorical grants" to private colleges and universities in the state. A-2. The funds are paid in the form of a direct grant which may be used for any purpose, except a sectarian purpose. A-52-A-55. There is no restriction against use of the aid to pay the salaries of teachers. R. /1 1519-1523. There in no restriction against use of the aid for scholarships, and at least one appellee has already used the aid for this purpose. R. 1478-1480. In administering the Maryland program, the State makes no further inquiry as to use upon learning that aid is used for scholarships. R. 1519-1523.

Also, there is no restriction against use of the aid for the maintenance and repair of buildings, nor is any attempt made to restrict use of the aid to the upkeep of facilities used exclusively for secular purposes. A-52-A-55. In fact, buildings are used for a variety of religious purposes. A-39, A-40, A-44, A-46.

At the time of trial, no specific guidelines for use of aid had been issued by the State. R. 1504-1509. Nor had the State made any effort to ascertain how funds already paid to

/1 "R." refers to the trial transcript.

the church-related appellees had been used. R. 1501. Although the State requires recipients to adopt internal accounting and administrative procedures to control the use of aid, it does not review the adequacy of such procedures. R. 1510-1511. Moreover, there are no reviews of class schedules or course descriptions to guard against sectarian use. R. 1519-1523; see A-18.

Two levels of screening are employed in an effort to ascertain that state aid is not used for sectarian purposes. First is a determination as to the eligibility of applicants, who are ineligible if they award primarily theological or seminary degrees. A-47. Second is a determination of whether state aid has been improperly used. Ibid. This second level is implemented through affidavits by the college president that funds will not be and have not been improperly used. A-48. State audit is available, and the district court found this to be "quick and non-judgmental". Ibid.

During the pendency of the litigation below, most of the funds at issue were held in escrow. A-37, n.2. By amendment to §67 of the Act effective July 1, 1973, the formula by which the amount of aid was computed was amended to include an allotment of aid based upon graduate degrees awarded. A-56. Upon learning of the State's intent to pay two appellees that portion of their aid allotment based upon graduate degrees, appellants moved for a pre-

liminary injunction against such payment. The motion was denied.

Following judgment against appellants, a motion for injunction pending appeal was filed with the district court, and was denied. Thereafter, an application for injunction pending appeal was filed with Chief Justice Burger. On November 25, 1974, the application was denied.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

In order for legislation authorizing public aid to church-related schools to be constitutional, it must have a secular legislative purpose, its primary effect must be one that neither advances nor inhibits religion, and it must not foster an excessive government entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-613. (1971). Appellants submit that the challenged legislation fails both the excessive entanglement and primary effect criteria.

I. THE ACT IS UNCONSTITUTIONAL BECAUSE CONTINUING PAYMENTS OF UNDEFINED AID TO CHURCH-RELATED INSTITUTIONS AND CONTINUING STATE ANALYSES REQUIRED TO GUARANTEE THAT AID IS NOT USED FOR RELIGIOUS PURPOSES NECESSARILY FOSTER EXCESSIVE GOVERNMENT ENTANGLEMENT WITH RELIGION OR THE POTENTIAL THEREFOR.

This Court has cautioned that a direct money subsidy to a church-related

institution "would be a relationship pregnant with involvement". Walz v. Tax Commission, 397 U.S. 664, 675 (1970). The considerations relevant to determining whether a particular aid program fosters excessive government entanglement with religion are the character and purposes of the institutions benefited, the nature of the aid, and the resulting relationship between government and the religious authority. Tilton v. Richardson, 403 U.S. 672, 678 (1971).

For the purpose of this entanglement analysis, appellants assume that the appellee institutions conform to the Tilton colleges. A-11. However, the nature of the aid and resulting church-state relationships or potential therefor under the Maryland aid program offer vivid contrasts to the program upheld in Tilton, and render the Act unconstitutional.

A. Nature of aid. The district court majority dismissed the distinction between the construction grants in Tilton and non-categorical grants under the Maryland program as constitutionally insignificant. A-17. If aid in the virtually unlimited form upheld below is constitutionally insignificant, then the nature of aid as a criterion in any entanglement analysis becomes meaningless. Appellants submit that the district court's acquiescence to Maryland's virtually unlimited form of aid was totally inconsistent with this Court's analyses in Lemon, Tilton, and subsequent cases, and warrants reversal. At the

least the question presented is substantial.

In Lemon, this Court recounted limited forms of aid to church-related institutions previously upheld, such as bus transportation, school lunches, public health services and secular textbooks. Id. at 616-617. The Court then vividly distinguished these earlier forms of aid from the teacher salary supplements there at issue, and stated: "[T]eachers have a substantially different ideological character from books. In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not." Id. at 617. (Emphasis added.) The Court emphasized that it was the potential if not actual intrusion of religion into teaching that rendered this form of aid unconstitutional. Id. at 618-619; accord, Levitt v. Committee For Public Education And Religious Liberty, 413 U.S. 472 (1973).

In Tilton, the nature of the aid criterion was expressly applied to institutions of higher education. There, one-time, single purpose grants and loans were authorized to institutions of higher education for the construction of academic facilities which could be used only for "defined secular purposes". 403 U.S. at 675, 679, 688. The Court sharply distinguished construction grants from teacher salary supplements rejected in Lemon, as follows:

"The entanglement between church and state is also lessened here by the non-ideological character of the aid that the Government provides. Our cases from Everson to Allen have permitted church-related schools to receive Government aid in the form of secular, neutral, or non-ideological services, facilities or materials that are supplied to all students regardless of the affiliation of the school that they attend. In Lemon and DiCenso, however, the state programs subsidized teachers, either directly or indirectly. Since teachers are not necessarily religiously neutral, greater governmental surveillance would be required to guarantee that state salary aid would not in fact subsidize religious instruction. There, we found the resulting entanglement excessive. Here, on the other hand, the government provides facilities that are themselves religiously neutral. The risks of government aid to religion and the corresponding need for surveillance are therefore reduced." Tilton v. Richardson, 403 U.S. at 687-688. (Emphasis added.)

Two years after Tilton was decided, this Court reemphasized the importance of nature of the aid by recounting that in Tilton "a bare majority was ... persuaded ... that carefully limited construction grants to colleges and universities could be sustained ...". Committee For Public Education And

Religious Liberty v. Nyquist, 413 U.S. 756, 776 (1973). (Emphasis added.)

The majority below erred in dismissing the importance of nature of the aid. As Judge Bryan noted in dissent below:

> "Presently the Act is simply a blunderbuss discharge of public funds to a church-affiliated or church-related college .... Research discloses to me no comparable carte blanche power of expenditure permissibly conferred by a state upon church-affiliated or church-related institutions." A-30.

Therefore, the judgment below should be reversed.

B. Resulting Church-State Relationship. In programs granting aid to church-related institutions, the state must guarantee that the aid does not advance religion. In Lemon this Court held that the state "must be certain ... that subsidized teachers do not inculcate religion ...". 403 U.S. at 619. In Tilton the absence of such a guarantee was the basis for this Court's invalidating a section of the challenged legislation on its face. 403 U.S. at 682-683; accord, Committee For Public Education and Religious Liberty v. Nyquist, 413 U.S. at 780.

The challenged legislation in Tilton escaped invalidation, because the character of the institutions and the

nature of the aid required only minimal contacts between church and state to guard against religious use. The Court stressed:

> "[U]nlike the direct and continuing payments ... [in Lemon] ... and all the incidents of regulation and surveillance, the Government aid here is a one-time, single-purpose construction grant. There are no continuing financial relationships or dependencies, no annual audits, and no Government analysis of an institution's expenditures on secular as distinguished from religious activities. Inspection as to use is a minimal contact." 403 U.S. at 688. (Emphasis added.)

The Maryland legislation, on its face, calls for direct and continuing payments to the institutions on an annual basis. A-52. The State continuously regulates the church-related appellees by requiring annually (i) prior verification that aid will not be used for sectarian purposes, and (ii) post-receipt verification that aid has not been so used, including necessary "follow-up" by the state. A-47, A-48. Also, the State analyzes the institutional appellees' use of aid on an annual basis to determine whether such use was secular or sectarian, and institutions are subject to annual audit although this is not mandatory. A-48.

Appellants submit that the foregoing characteristics constitute precisely

the continuing regulation, financial dependencies, audits and governmental analysis of expenditures of church-related institutions which this Court has proscribed. See Tilton v. Richardson, 403 U.S. at 688. Moreover, as Judge Bryan stated in dissent:

> "Potentiality is also an assaying factor in measuring whether the Act's play within the colleges creates 'an excessive government entanglement with religion'.... Instantly the possibility is real and manifold. This is attributable to the complete absence of any appointment of the objects of the Act's bounty when extended to church-affiliated or church-related entities. In this context, to be assured that none of the public funds kindle or fire religion and theology, a closer oversight is required of the appropriation and application of the grants than in secular schools. Thus unavoidably the State is drawn into frequent and constant touch with the fiscal affairs of each college." A-32-33. (Emphasis added.)

Thus, both the actual and potential entanglement between the State and church-related institutions necessarily are excessive.

C. Tilton Entanglement Perspective Summarized. In its entanglement analysis in Tilton, the court distinguished Lemon, because "three factors substan-

tially diminish the extent and the potential danger of the entanglement." 403 U.S. at 685. First, religious indoctrination was not a substantial purpose or activity of the defendant schools. Id. at 687. Second, the aid provided for "facilities that are themselves religiously neutral." Id. at 688. Third, the aid was "a one-time single purpose construction grant ... [with] ... no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution's expenditures on secular as distinguished from religious activities." Ibid.

The court viewed as significant the cumulative impact of the foregoing factors, as opposed to any one factor:

"No one of these three factors standing alone is necessarily controlling; cumulatively all of them shape a narrow and limited relationship with government .... The relationship therefore has less potential for realizing the substantive evils against which the Religion Clauses were intended to protect.

We think that cumulatively these three factors also substantially lessen the potential for divisive religious fragmentation in the political arena." Ibid. (Emphasis added.)

Conspicuously absent from the

Maryland aid program are at least two of these three factors. First, the Maryland aid is in no way restricted to provide "facilities that are themselves religiously neutral." Second, the Maryland aid is by no means "a one-time, single purpose construction grant". On the contrary, there are continuing financial relationships, because aid is distributed annually. Also, there are continuing governmental financial analyses of expenditures on secular as opposed to religious purposes.

It seems clear that whatever the eventual outcome, the entanglement issues presented by this appeal are substantial, and merit plenary consideration, with briefs on the merits and oral argument, for their resolution.

II. THE PRIMARY EFFECT OF THE MARYLAND AID PROGRAM IS TO ADVANCE RELIGION.

This Court has held that aid has "a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." Hunt v. McNair, 413 U.S. 734, 743 (1973). However, it is clear that "primary effect" also applies to aid which only potentially or partially advances religion:

"Any remaining question about the contours of the 'effect' criterion

were resolved by the Court's decision in Tilton, in which the court found the mere possibility that a federally-financed structure might be used for religious purposes 20 years hence was constitutionally unacceptable because the grant might 'in part have the effect of advancing religion'." Committee For Public Education And Religious Liberty v. Nyquist, 413 U.S. at 783, n. 39. (Emphasis added.)

The Maryland aid program has the "primary effect" of advancing religion in a number of ways.

A. Failure To Guarantee That State Aid Will Not Be Used To Advance Religion. The Act does not restrict use of aid to pay teachers' salaries. There is no state inquiry as to the substance of courses whose teachers (clergy or non-clergy) are financially suppported by the state. R. 1519-1523. This absence of review plainly violates Tilton's mandate that "[s]ince teachers are not necessarily religiously neutral, greater governmental surveillance would be required to guarantee that state salary aid would not in fact subsidize religious instruction". 403 U.S. at 687-688.

The Act does not restrict use of aid for scholarships. At least one appellee has already used aid for this purpose. R. 1478-1480. In administering the Act the State would make no further inquiry as to use upon learning that aid

would be used for scholarships. R. 1519-1523. Therefore, upon crediting students' tuition in the amount of their scholarships, schools are free to use funds without restriction.

Since there is no effort whatsoever to ascertain that the Maryland aid, when ultimately received by the church-related appellees, is confined to secular purposes, the primary effect of aid is to advance religion. Committee For Public Education And Religious Liberty v. Nyquist, 413 U.S. at 780-787; Sloan v. Lemon, 413 U.S. 825 (1973); Wolman v. Essex, 409 U.S. 808 (1972), affirming 342 F. Supp. 399 (S.D. Ohio E.D. 1972).

Tilton mandates such a result. There the court struck down that part of the aid program which would have permitted the future unrestricted use of facilities. 403 U.S. at 683-684. A fortiori the present unrestricted use of scholarship funds by church-related institutions violates the Establishment Clause.

The Act does not restrict aid used for the maintenance of buildings to buildings used exclusively for secular purposes. This renders the Maryland aid program just as invalid as the New York pre-college maintenance and repair program rejected in Committee For Public Education And Religious Liberty v. Nyquist. There the court emphasized:

"No attempt is made to restrict payments to those expenditures related to the upkeep of facilities

> used exclusively for secular purposes.... Absent appropriate restrictions on expenditures for these and similar purposes, it simply cannot be denied that this section has a primary effect that advances religion...". 413 U.S. at 774.

Since it is clear that at least some buildings of the church-related appellees are used for religious purposes, the absence of any restrictions as to building maintenance and repair compels a ruling that the primary effect of Maryland's aid program is to advance religion.

The foregoing, as well as the State's failure to establish guidelines and review the schools' accounting procedures and course content, supra p. 6, reflect an absence of effective guarantees against religious use. Even the available audit procedure is suspect. The district court held this "non-judgmental"; and if the auditor fails to "judge" whether aid was issued for secular or sectarian purposes, it is difficult to see how it can be effective. Therefore, the Act has the primary effect of advancing religion.

B. Financial Support Of Classes In Which Prayer is Regularly Recited. The district court found that "there is a practice at ... [four]... of the defendants of starting classes with prayer." A-39. The extent of prayer ranges from approximately 6% at Mount

Saint Mary's College (Pl. Ex. 117B; R. 709) to a majority at St. Joseph College. A-40. The recitation of prayer is treated as a facet of each instructor's academic freedom. Ibid. There is no effort by the State to prohibit classroom prayer or to condition aid to teachers upon such a prohibition. See R. 1519-1523.

Prior rulings by this Court make abundantly clear that neither state sponsored prayer nor religious instruction, whether or not state sponsored, is permissible in the public schools. Engel v. Vitale, 370 U.S. 421 (1962); Abington School District v. Schempp, 374 U.S. 203 (1963); Illinois Ex rel McCollum v. Board of Education, 333 U.S. 203 (1948). Nor may the state permit such activity in its public colleges. See Epperson v. Arkansas, 393 U.S. 97, 106-107 (1968).

Since the State may not sponsor prayer or even permit religious instruction in public colleges, it may not finance such activity in private colleges. This is vividly demonstrated by this Court's striking down the 20 year limitation against use of federal aid for religious purposes in Tilton. 403 U.S. at 679-680, 683.

Aid for classroom instruction is admittedly part of the Maryland program. R. 1519-1523; See R. 1582-1583. Since there is a practice of prayer in at least some classrooms, the State is financing religious worship. Although

the trial court found prayer to be "peripheral", A-40, the de minimis nature of any prayer is irrelevant. Abington School District v. Schempp, 374 U.S. at 225. Therefore, the Maryland program is unconstitutional.

C. Financial Support of Institutions Which Impose Religious Restrictions On Faculty Appointments And Perpetuate De Facto Religious Restrictions On Student Admissions. In Tilton, the Court left open whether colleges imposing religious restrictions on admissions would be eligible for aid. 403 U.S. at 682. The district court found that one appellee attempts to recruit to its faculty each year two members of a religious order. A-41. Two appellees favor a member of the sponsoring religious order for budgetary reasons. Ibid. To the extent that such appellees favor members of a religious order in selecting faculty, there are religious restrictions upon faculty appointments. Therefore, appellants submit that they are ineligible for aid.

For each appellee "the religious affiliation of the college would be readily apparent to any prospective applicants who took the time to read the catalogue." A-43. The trial record reflects that except for Western Maryland College, the appellee institutions concentrated their recruiting efforts in large measure upon members of the affiliated religion. See R. 575, 586-587, 1021-1022, 1027-1029, 1203-1204, 1296, 1323-1325.

By perpetuating the predominance of one religious group through recruiting efforts directed in large measure toward that group, four appellees impose de facto restrictions on student admissions. Analogous though distinguishable employment recruiting practices have been held unlawful under civil rights laws. E.g., United States v. Dillon Supply Company, 429 F. 2d 800, 803-804 (4th Cir. 1970); United States v. Georgia Power Company, 474 F. 2d 906, 911, 925 (5th Cir. 1973). Appellants submit that legislation permitting payment of state aid to institutions imposing de facto religious restrictions on student admissions is a law respecting an establishment of religion. See Tilton v. Richardson, 403 U.S. at 682.

D. Financial Support of Institutions Whose Secondary Purpose Is To Encourage Spiritual Development And Which Require Students To Take A Limited Range Of Courses In Theology And Doctrine Taught Primarily Or Exclusively By Clerics Of The Affiliated Church. In Tilton, the court left open whether institutions which required instruction in theology and doctrine could be eligible for public aid. 403 U.S. at 682. Appellees all require that such courses be taken. A-46. At all of the appellee institutions, "the study of religion or theology may become an instrument for strengthening the students' religious life." A-49.

This finding was based upon the schools' offering only a limited array of theology or religion courses, the staffing of

departments primarily or exclusively with clerics, and the appellees' secondary objective of fostering religious experience. A-41, A-42, A-46. Appellants submit that such institutions are ineligible for aid. See Tilton v. Richardson. 403 U.S. at 682.

E. Financial Support of Sectarian Institutions. Appellants submit that the trial record, in its entirety, warrants a finding that the appellee institutions, except Western Maryland College, are sectarian. Therefore, they are ineligible for aid.

III. IF THE CHALLENGED LEGISLATION IS HELD UNCONSTITUTIONAL, APPELLEES SHOULD BE REQUIRED TO REFUND ALL PAYMENTS NOT ENJOINED UPON MOTIONS OR APPLICATION TIMELY FILED BY APPELLANTS.

As stated earlier appellants attempted to enjoin payments to appellees by filing a motion for preliminary injunction and motion for injunction pending appeal to the district court, and an application for injunction pending appeal to this Court. Both motions and the application were denied.

In Lemon v. Kurtzman (Lemon II), this Court stated:

> "That is not to say, of course, that the flexible range of federal injunctive powers should be curtailed so as to permit state officers

> to proceed with their business regardless of serious constitutional questions concerning state legislation. Indeed, a significant purpose of these tools is to preserve rights of all parties and to confine unnecessary harm during the often protracted pendency of constitutional litigation." 411 U.S. 192, 208 n. 8. (1973).

The institutional appellees were plainly on notice that a substantial challenge to their right to the funds was at issue. They also knew that part of the relief sought was a refund of all funds paid under the Maryland aid program if the Act were held unconstitutional. Under these circumstances, they should be required to repay the funds if the Act is held invalid. Not requiring them to do so would leave appellants, who made timely efforts to enjoin payment, without any effective remedy as to approximately $2,000,000.00 paid pursuant to a law respecting the establishment of religion.

CONCLUSION

The foregoing plainly demonstrates that this Court has jurisdiction of the appeal, and the questions presented are substantial.

Respectfully submitted,

Lawrence S. Greenwald

Attorney for Appellants

Melvin L. Wulf
Of Counsel

APPENDICES

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JOHN C. ROEMER, III, et al.	:	
V.	:	CIVIL NO. 72-307-Y
BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND, et al.	:	

Filed: October 16, 1974

Before Bryan, Circuit Judge, and Watkins and Young, District Judges.

Lawrence S. Greenwald, Esq., Baltimore, Maryland, for Plaintiffs.

Francis B. Burch, Esq., Attorney General, and George A. Nilson, Esq., Assistant Attorney General, Baltimore, Maryland, for Board of Public Works of the State of Maryland, Marvin Mandel, Governor, Louis L. Goldstein, Comptroller, and John A. Luetkemeyer, Treasurer.

Paul R. Connolly, Esq., and Charles H. Wilson, Jr., Esq., Washington, D.C., for Mount Saint Mary's College and The Associated Professors of Loyola College in the City of Baltimore, Inc.

John H. Mudd, Esq., Baltimore, Maryland, for Western Maryland College.

George W. Constable, Esq., Baltimore, Maryland, for College of Notre Dame of Maryland, Inc.

George T. Tyler, Esq., Baltimore, Maryland, for Saint Joseph College of Emmitsburg, Maryland, Inc.

Young, District Judge.

Article 77A, § 65, et seq. of the Maryland Annotated Code provides public aid in the form of non-categorical grants to eligible colleges and universities in the State. Four Maryland citizens and taxpayers[1] have challenged the constitutionality of Md. Ann. Code art. 77A, § 65, et seq. (1969 Repl. Vol.) on the grounds that the statute

1. The original plaintiffs in this suit included the American Civil Liberties Union of Maryland, and Protestants and Other Americans United for Separation of Church and State. However, in an earlier unpublished opinion in this case, both of these organizational plaintiffs were dismissed for lack of standing. See American Civil Liberties Union of Maryland v. Board of Public Works of the State of Maryland, Civil No. 72-307-Y (D. Md. Dec. 13, 1972) (Young, J.). The four individual plaintiffs, all Maryland taxpayers, were permitted to proceed on the basis of Flast v. Cohen, 392 U.S. 83 (1968).

violates the Establishment Clause of the First Amendment[2] to the Constitution of the United States. Included among the eligible recipients are five church-affiliated institutions. The plaintiffs seek an injunction against further aid grants and a declaration that all funds received by the recipient institutions be paid over to the state with interest.[3] The defendants in the case are the Governor, Comptroller and Teasurer of the State of Maryland, all of whom constitute the Board of Public Works of the State of Maryland, and the five church-affiliated institutions which are

2. "Congress shall make no law respecting an establishment of religion* * *."

In American Civil Liberties Union of Maryland v. Board of Public Works, supra n.1, this Court dismissed plaintiffs' challenge to the constitutionality of this statute based on the Free Exercise Clause of the First Amendment.

3. See Findings of Fact, Appendix, n.2.

recipients of aid under the statute.[4] The thirteen non-church-affiliated educational institutions which receive aid are not joined as defendants.

Jurisdiction is based on 28 U.S.C. § 1331. A District Court of three judges was convened pursuant to 28 U.S.C. §§ 2281 and 2284. United States District Judge Joseph H. Young of this panel was appointed to conduct fact-finding hearings as to the character of the defendant schools and the administration of the Act. The findings of fact which resulted from these hearings constitute the sole factual basis upon which this opinion rests, and are incorporated into this opinion as an appendix.

Section 66 of the article under attack limits the aid program to private colleges and universities which are accredited by the State Department of Education. However, educational institutions which award only seminarian or

4. The College of Notre Dame, Mount St. Mary's College, Saint Joseph College, and the Associated Professors of Loyola College in the City of Baltimore, Inc. (Loyola College) are all affiliated with the Roman Catholic Church. Western Maryland College is affiliated with the Methodist Church. Since the initiation of these proceedings Saint Joseph College has become defunct although it is still joined as a defendant in the case.

theological degrees are not eligible for aid. In 1972, after the decisions in Lemon v. Kurtzman, 403 U.S. 602 (1971), and Tilton v. Richardson, 403 U.S. 672 (1971), the Maryland Legislature enacted section 68A which reads: "None of the moneys payable under this subtitle shall be utilized by the institutions for sectarian purposes." Ch. 534, [1972] Md. Laws 1495.

The responsibility for administration of this program is vested in the Maryland Council for Higher Education. The Council is a public commission appointed by the Governor to coordinate state programs in higher education and to prepare reports and recommendations to appropriate state officials and institutions for the benefit of Maryland higher education. The Council was established prior to the creation of the state aid program in question and had developed considerable expertise as to the character and functions of the various private colleges and universities in the State, independent of its functions as administrator of this program.

The formula by which aid is allocated among the various schools has been changed on several occasions. As the statute was originally enacted, the amount of aid to be given to the schools was computed by multiplying by two hundred dollars the number of associate of arts degrees and by five hundred dollars the number of bachelor's degrees,

excluding seminarian or theological degrees, conferred by the institution in the previous academic year. The funds would be paid to the school in the form of a direct grant which the school could use for any purpose. The 1973 amendments provided for an additional five hundred dollar grant for each graduate degree conferred in the previous academic year. The 1974 amendments provide a formula by which 15% of the average yearly expenditure for a student in the state college system is multiplied by the number of full-time students in each school up to a total of approximately $3,000,000 for the entire program. Each change in the statutory formula has resulted in a significant increase in public aid to the recipient institutions.

The analysis of Article 77A, §§ 65 et seq., presents this Court with a problem of great sensitivity and complexity. Throughout this country's history the separation of church and state has served the nation well as a guard against religious oppression. This principle has further served to protect the vitality and integrity of American religious institutions.[5] The existence of a system of private colleges and universities, including

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5. Over a century ago Alexis de Tocqueville concluded that the unusual strength of religion in America was largely attributable to the separation of church and state:

(cont. on next page)

a component of church-affiliated institutions, has maintained a pluralist tradition in higher education and has resulted in substantial savings to the public treasury. The question presented is whether the Legislature in an otherwise commendable effort to assist the system of private education in Maryland has violated the First Amendment prohibition of laws "respecting an establishment of religion." This Court must conclude that the statute does not violate the Establishment Clause.

> Religions intimately united with the governments of the earth have been known to exercise sovereign power founded on terror and faith; but when a religion contracts an alliance of this nature, I do not hesitate to affirm that it commits the same error as a man who should sacrifice his future to his present welfare; and in obtaining a power to which it has no claim, it risks that authority which is rightfully its own.* * *
>
> In America religion is perhaps less powerful than it has been at certain periods and among certain nations; but its influence is more lasting. It restricts itself to its own resources, but of these none can deprive it; its circle is limited, but it pervades it and holds it under undisputed control. A. de Tocqueville, Democracy in America, 321, 323 (Bradley ed. 1945).

The Establishment Clause clearly does not prevent any form of public aid or service to any church-affiliated institution, see, e.g., Hunt v. McNair, 413 U.S. 734 (1973); Tilton v. Richardson, 403 U.S. 672 (1971); Walz v. Tax Commission, 397 U.S. 664 (1970); Board of Education v. Allen, 392 U.S. 236 (1968); Everson v. Board of Education, 330 U.S. 1 (1947); Bradfield v. Roberts, 175 U.S. 291 (1899).[6] The Supreme Court has also explicitly rejected the notion that "* * * all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends." Hunt v. McNair, supra at 743. On the other hand, aid to church-related institutions must be analyzed with the greatest care to insure that the purposes of the religion clauses are not violated. See Committee for Public Education v. Nyquist, 413 U.S. 756 (1973); Levitt v. Committee for Public

6. As an example, the Maryland Council on Higher Education performs a valuable function for Maryland higher education generally, and thereby benefits church-affiliated colleges and universities located in Maryland. There is no suggestion, however, that the Council's operations, leaving aside the question now before this Court, are violative of the Establishment Clause.

Education, 413 U.S. 472 (1973); Sloan v. Lemon, 413 U.S. 825 (1973); Lemon v. Kurtzman, 403 U.S. 603 (1971).

The Supreme Court has evolved a three part test by which the constitutionality of a statute may be determined in light of the Establishment Clause. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster 'an excessive government entanglement with religion.'" Lemon v. Kurtzman, supra at 612-13. Government entanglement must be avoided in two areas--the statute must not cause excessive administrative entanglement in its enforcement and the aid program must not cause an excessive entanglement of religion in the political process. See Lemon v. Kurtzman, supra.

The findings of fact in this case clearly indicate that the statute was enacted with a secular purpose. The program will save the taxpayers of Maryland substantial amounts of money which would otherwise have had to be spent to expand public educational institutions. The Court notes that over two-thirds of the recipient institutions have no religious affiliations.

The findings of fact also conclude that the statute has not had the primary effect of advancing or inhibiting religion. This Court's analysis indicates that this conclusion is correct.

A court may find that the primary effect of a program of aid will be to advance religion". . . when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." Hunt v. McNair, supra at 743.

Both Tilton and Hunt are instructive in determining when an institution is "pervasively sectarian." The Court in Tilton rejected the use of a composite profile of a sectarian institution and instead focused on the actual characteristics of the four independent colleges. The Court noted that all four schools subscribed to the 1940 Statement of Principles on Academic Freedom and Tenure endorsed by the American Association of University Professors, and that an atmosphere of academic freedom prevailed on each campus. Each of the four schools admitted students and hired faculty who were not members of the affiliated church. None of the schools required attendance at religious services. Although all of the schools required students to study theology, the courses were taught according to the academic requirements of the subject matter. The five defendants in this case have been found to conform closely to the colleges approved in Tilton v.

Richardson, supra. See Findings of Fact.[7] Thus, as a matter of fact the defendants are not so pervasively sectarian that aid would have a primary effect of advancing religion.

The aid program also cannot be said to fund a "specifically religious activity in a secular setting." In a higher education setting this prohibition is satisfied by the existence of limitations and safeguards against sectarian use. Thus in Tilton, the provision held unconstitutional

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7. The school analyzed in Hunt v. McNair, supra, provides a striking contrast to the five defendant institutions in this case. The board of trustees of that school were elected by the South Carolina Baptist Convention. The approval of the Convention was necessary for certain financial transactions, and only the Convention could amend the college charter. Nevertheless, the school was found to be similar to the institutions involved in Tilton.

The defendant Maryland schools are characterized by a high degree of institutional autonomy. The affiliated institutions exercise no control over the budget or policies of the schools. Only Western Maryland receives a small financial contribution and submits a statistical report to the affiliated church.

permitted the recipient school to use publicly-financed buildings for religious purposes after a twenty-year period. Some form of government surveillance of the use of the buildings would be necessary even after twenty years to prevent a specifically religious activity from ever occurring in the buildings. In Hunt, the Court found that the prohibitions on religious use in the lease and the Act served to satisfy the requirements that no specifically religious activity be supported.

The focus of our inquiry, therefore, must be whether sufficient safeguards exist to ensure that funds are not diverted to support religious activity. Such safeguards exist in the Maryland statute. The statute bars use of funds for sectarian purposes or to support seminary or divinity programs. The president of the institution must verify to the Council on Higher Education on two occasions each year that public funds have not and will not be used for sectarian purposes. The Council itself has administrative authority to perform such audits of public funds as may be necessary to satisfy the requirements of the statute. See Findings of Fact. This Court is satisfied that with one exception there are sufficient safeguards to prevent the use of the funds for sectarian purposes.

The only qualification to this general conclusion is as to theology and

religion courses. The fact finder was unable to characterize the course offerings in these subjects available at the various defendant schools. Even though academic freedom prevailed at each defendant school and there was no indication that religious indoctrination was a goal of these schools, a possibility existed that these courses could be devoted to deepening religious experiences in the particular faith rather than to teaching theology as an academic discipline. Theology or its equivalent is a required course at each school and in each case is taught by a cleric of the affiliated church. Absent a clear indication that the theology was taught as an academic discipline, state aid to such programs cannot be justified. As no such indication exists as to these defendants, the Council on Higher Education must take steps to ensure that public funds are not used to support such programs.

The Council's failure to take such steps thus far, however, does not lead to a finding of unconstitutionality. As was noted in Tilton: "A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement. . . But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional." Tilton v. Richardson, supra at 679.

The excessive entanglement test is concerned in its administrative aspect that an aid program does not lead to government encroachment on the precincts of religion, and in its political aspect that religion does not intrude into the political process. In each case, some governmental involvement with religion is perhaps inevitable, cf. Walz v. Tax Commission, supra (governmental duty to ensure that only bona fide religious bodies receive tax exemption), but such entanglement must be kept to the minimum consistent with fulfillment of government responsibilities.

In evaluating administrative entanglement, the Court must examine three factors: The "character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." Lemon v. Kurtzman, supra at 615.

The character and purposes of the five defendant institutions have been discussed supra and in the Findings of Fact. It need only be noted that these schools perform essentially secular educational functions and are quite similar to the defendant schools in Tilton. Religion does not permeate the secular educational function of these schools.

The nature of the aid factor of the entanglement analysis focuses on the ideological neutrality or bias of the particular aid program. Thus, the Supreme Court has approved aid programs which provided funds for the construction of school buildings in Tilton and Hunt and has also approved loans of textbooks, see Board of Education v. Allen, supra, and money for bus rides, see Everson v. Board of Education, supra, requiring only that the aid given was itself ideologically neutral and required a minimum of government surveillance.

By contrast, the Supreme Court has disapproved aid programs which support building maintenance, see Committee for Public Education v. Nyquist, supra, and teachers' salaries, see Lemon v. Kurtzman, supra, or which assist the parents of school children, see Levitt v. Committee for Public Education, supra; Committee for Public Education v. Nyquist, supra.

What emerges from a consideration of these cases is the conviction that the ideological neutrality of a particular program of aid is dependent on the type of institution being benefited. The classroom buildings provided in Tilton and Hunt are no more neutral in the abstract than the classroom buildings which were maintained with public funds in Nyquist. The classes taught in the Tilton and Hunt

classrooms are no more neutral than the classes taught by publicly subsidized teachers in Lemon, all other things being equal. Obviously, all other things are not equal. What would be impermissible in an institution staffed by members of a particular faith, administratively controlled by a religious body, and dedicated to the inculcation of a particular faith, may well be permissible in an autonomous institution staffed by faculty hired on the basis of academic merit, where academic freedom prevails, and where courses are taught in accordance with the requirements of an academic discipline. The Court could validly require that the state monitor the content of teaching at the primary or secondary level to prevent even inadvertent lapses into religious indoctrination on the part of publicly subsidized teachers. Yet the Court could conclude that such monitoring would not be necessary at a college which maintained its academic freedom and integrity.

It is, therefore, not sufficient to argue, as plaintiff does, that the aid program here is not ideologically neutral because in some respects it may resemble aid programs previously found unconstitutional in a lower school context. In Hunt v. McNair, supra at 746 the Court said that ". . . the degree of entanglement arising from inspection of facilities as to use varies in large measure with the extent to which religion permeates the institution."

The Maryland aid program is characterized by direct non-categorical grants restricted by a prohibition on use for sectarian purposes. Leaving aside the question of the efficacy of this prohibition, the differences between this program and the Tilton program are more apparent than real. In Tilton direct grants were available for the construction of virtually any type of building, subject to similar prohibitions against sectarian usage. Thus, the Tilton funds were used to construct two libraries, a music, drama and arts building, a science building and a language laboratory. Every non-sectarian program in the defendant colleges could be benefited by the federal aid program, and the difference between the Tilton aid program and the Maryland aid program thus resolves itself into a difference between construction grants and non-categorical grants. Clearly the latter distinction does not rise to constitutional dimensions.

The relationship between church and state which results from this aid program is not entangling. The program is administered by the Council on Higher Education which has considerable expertise as to the character and programs of the State's institutions of higher education derived from its other responsibilities. The Council performs a two-step screening process to ensure that funds are not improperly used. The first step requires the Council to

eliminate schools which primarily award theological degrees. The second step requires the Council to examine the use made of funds by recipient institutions. See Findings of Fact.

Because of the nature of the recipient schools, there is no necessity for state officials to investigate the conduct of particular classes of educational programs to determine whether a school is attempting to indoctrinate its students under the guise of secular education. Such governmental monitoring of the context of an educational program, especially on religious grounds, would raise grave questions. Concern over this potential government role was clearly the heart of the Supreme Court's entanglement analysis in the primary and secondary education cases. See Committee for Public Education v. Nyquist, supra; Levitt v. Committee for Public Education, supra; Sloan v. Lemon, supra; Lemon v. Kurtzman, supra. However, the procedures in the Maryland program have been found to be effective and non-judgmental.

The procedural posture of this case has prevented the development of follow-up procedures to ensure that no state funds are converted to religious uses in later years. However, unlike the 20-year restriction held unconstitutional in Tilton, the prohibition on sectarian use in the statute is absolute, and the Council seems aware of its responsibilities in this matter. The Court is

satisfied that adequate, non-entangling follow-up procedures will be developed. See Findings of Fact.

Three factors in Tilton were found to have mitigated the degree of entanglement in the federal aid program. 1) The aid provided was found to be religiously neutral. 2) The recipient schools were characterized by an absence of religious indoctrination. 3) The aid was in the form of a "one time construction grant."

As noted supra, the neutrality of the aid is dependent upon the essential character of the school. Where the secular aspects of a school may be separated from the sectarian, as in the case of these defendants, aid to the sectarian aspect, regardless of the form of the aid, will necessarily be religiously neutral. The aid in this program is restricted to the secular aspects of the institutions.

It has been found that religious indoctrination is not a purpose of these institutions. Although each school has as a secondary purpose the encouragement of the spiritual development of the students, at none of these schools does this encouragement go beyond providing opportunities for religious experience. The religious programs at each school are separable from the secular programs, and the latter are the only beneficiaries of state aid.

Although the Maryland program does not provide "one time construction grants", the continuing nature of the program is not constitutionally fatal. Even Tilton required a continuing and perpetual involvement of the government with the schools to ensure that publicly financed buildings would never be used for sectarian purposes. However, an analysis of the aid program in Hunt v. McNair, supra, is far more revealing of the degree of involvement which is constitutionally permissible.

The South Carolina Educational Facilities Authority has the power to issue revenue bonds by which school buildings and facilities could be constructed. If the authority financed construction of a building, the school could, as in Hunt v. McNair, supra, convey the building to the State Authority and lease back the building for use. The lease and the statute both contained restrictions against sectarian use. The Authority was given the power to issue regulations and to set fees for the use of the facilities. A decision of the South Carolina Supreme Court limited the Authority's fee-setting and rule-making powers to the establishment of a fee schedule which would ensure repayment of the revenue bonds. In the South Carolina scheme, the state administrative agency acted as the recipient institution's landlord and acquired substantial control over the school's ability to set its own fees and charges. The Supreme Court found the

South Carolina statute to be constitutional even though it established a school-governmental relationship which was far more intimate and pervasive than any relationship likely to result from the statute now under consideration. See Hunt v. McNair, supra.

The Supreme Court has yet to elaborate on the political entanglement test. However, the Court's primary concern is that society be spared the trauma of political strife on religious grounds over governmental benefits. Aid programs to primary and secondary schools have been found to contain the seeds of such strife. As an example, 85% of the students in New York State who were benefited by the statute held unconstitutional in Committee for Public Education v. Nyquist, supra, were attending church-affiliated schools, primarily of the Roman Catholic faith. The Court noted that annual appropriations and the prospect of an increasing demand for public funds created a potential for political-religious conflict. See also Lemon v. Kurtzman, supra.

However, in Tilton v. Richardson, supra, the Court distinguished higher education from secondary and primary education as to political effect. "The potential for divisiveness inherent in the essentially local problems of primary and secondary schools is significantly less with respect to a college or university whose student constituency is not local but diverse and widely

dispersed." 403 U.S. at 688-89. The Court also noted that the same factors which mitigated administrative entanglement also mitigated political entanglement.

This Court is satisfied that the Maryland statute does not create a substantial danger of political entanglement even though the Maryland program calls for annual appropriations, and the recipient schools are likely to request additional aid. As in Tilton, the factors which mitigated the administrative entanglement also served to mitigate political entanglement. Of greater importance in mitigating the effect of religious divisiveness is that the program is designed to aid higher education generally, not church-affiliated colleges specifically. Only five of the eighteen eligible institutions which have received funds are church-affiliated. Unlike the Nyquist situation, this program does not primarily aid one particular religious group with a large educational establishment. Furthermore, the defendant schools are substantially autonomous institutions, whereas the Nyquist schools generally were subject to the direct control of the affiliated church. Political conflict over the size of allocations or the scope of programs in Maryland are not likely to involve the affiliated churches to a major degree in the political controversy. The controversies which result from the program are likely to involve questions of

fiscal responsibility and educational requirements rather than questions of the religious identity of recipient schools.

This Court must, therefore, conclude that Md. Ann. Code art. 77A §§ 65 et seq., as amended in 1972, is constitutional.

The original version of this Act, passed in 1971, provided no restrictions on sectarian use of funds. Accordingly, the 1971 version was unconstitutional. As substantial funds were paid out in 1971 to the five schools, this Court must decide whether to order the recipient schools to refund the illegally paid funds to the State of Maryland.

The question is governed by Lemon v. Kurtzman, 411 U.S. 192 (1973) (Lemon II), in which the Supreme Court refused to order the refund of moneys paid out under the statute held unconstitutional in Lemon v. Kurtzman, 403 U.S. 602 (1971) (Lemon I). In Lemon II, the Court noted that in recent years newly developed principles of law, both constitutional and non-constitutional, frequently have not been accorded retroactive effect. See Linkletter v. Walker, 381 U.S. 618 (1965). The decision to apply a principle retroactively is based on an equitable balancing between the interests of the state and of the party acting in reliance on the prior principle. The

Court used the test set forth in Linkletter, supra, to analyze the problem. A court must look to the prior history of the rule, the purpose and effect of the rule, and whether retrospective operation will tend to further or retard the rule's operation.

The Court refused to order a refund in Lemon II. In Lemon I the plaintiff had filed suit months after payments were made and had refrained on tactical grounds from seeking an injunction. No further entanglement or primary effect of advancing religion was foreseen as a result of permitting defendants to keep funds. The schools had relied to their detriment on the funds in planning their programs, and the decision in Lemon I could not have been anticipated. The Court observed that, realistically, people and institutions must conform to the law as it presently exists, not as it may be construed to be after subsequent court decisions. A court decree in equity based on a new principle should seek to work the least harm consistent with the purposes of the new rule.

In this case, suit was filed nine months after enactment of the statute and five months after payments were made. The defendants have already spent the funds allocated for 1971 in reliance on the constitutionality of the program. Both Lemon I and Tilton were decided after the enactment of the statute and the expenditure of the funds and could

not have been anticipated. See Lemon v. Kurtzman, supra. Furthermore, the 1972 Legislature corrected the defects in the original Act by prohibiting sectarian use of the funds, thereby substantially eliminating the danger of unconstitutional use of funds. The constitutional values to be protected by the Establishment Clause would not be furthered by refund despite the unconstitutionality of the 1971 version of the Act.

Accordingly, it is this 16th day of October, 1974, by the United States District Court for the District of Maryland, ORDERED and DECLARED that:

1. Md. Ann. Code art. 77A, §§ 65 et seq. is constitutional on its face and as applied.

2. Plaintiff's motion for injunction of the application of Article 77A, §§ 65 et seq. be, and the same is, hereby DENIED.

3. Plaintiff's motion for refund of aid program be, and the same is, hereby DENIED.

/s/ R. Dorsey Watkins

/s/ Joseph H. Young

Albert V. Bryan, Senior Circuit Judge, dissenting:

The first Amendment's Establishment of Religion clause[1] is here pressed to vitiate Maryland's monetary aid to the five defendant private institutions[2]

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1. The First Amendment is applicable to the laws of each State through the Fourteenth Amendment. Murdock v. Pennsylvania, 319 US 105, 108 (1943).
2. References herein to the defendant colleges are not intended to include St. Joseph's College, since it is no longer a subsisting institution.
   Nor is Western Maryland College included, for I find it is no longer a church-affiliated or church-related institution within the scope of the constitutional inquiry now before the court. Plaintiffs in answer to this defendant's interrogatories explicitly disclaimed any contention that it is a school of that character and also disclaimed other immediately related aspects of the school's structure. On January 10, 1974 - just four days before the fact findings were filed in this case - the previous budget provision by the Methodist Church for this college was, at the latter's request, discontinued for the future. Thus to my mind, if it once existed, all such affiliation or relationship of college and church was terminated.

of higher learning under Annotated Code Art. 77A, § 65-70. Disagreeing reluctantly with the majority, I find the Act in these instances does in truth offend the Constitution by its provisions of funds, in that it exposes State money for use in advancing religion, no matter the vigilance to avoid it.

I. The legislation must be conceded to be secular in purpose, and so the first point for consideration is whether each of the three remaining defendant institutions is a church-affiliated or church-related body. It is hardly deniable that all of them are of this category.

According to the court's findings, they maintain a "vigorous religion or theology department" and the "primary concern of these departments, either admittedly or by the obvious thrust of the courses, is Christianity". Moreover, these departments are staffed almost exclusively with clerics wearing their affiliated churches' ministerial vestments. Also in its findings the court sees itself "unable to characterize the manner in which theology and religion are conducted" and feels obliged to made "no finding as to whether [the study of religion or theology] is sectarian at any of the defendant institutions".

The colleges' religious affiliations are at once readily and immediately made known in the college catalogues.

Religious exercises in the faith of the church are conducted on the campuses, but attendance is not compulsory. In some classrooms there are religious figures and pictures. Quite understandably the large majority of students in each institution in suit attends the church of its religious persuasion. Every college has a chaplaincy program, with the chaplain a clergyman of the affiliated church.

While the instruction, liturgy and symbolisms just mentioned are to be honored at all times and in all places, to me these incidents quite clearly depict the colleges as church-affiliated or church-related. Indeed, this conclusion appears not to be seriously debated.

II. The next question is whether the instant college-aid programs may in primary effect affront the Act's interdiction of the use of State money for sectarian purposes. I think they do.

It is the potential use of the moneys which is the determinant to be looked to appraising the constitutionality of State monetary aid to church-affiliated or church-related institutions, as I read the Supreme Court's enunciations. The legality of the moneys' utilization is not finally and conclusively resolved by the actual use of the funds, no matter how neutral, bona fide or praiseworthy. It is the reasonable opportunity for sectarian misapplication that is the gauge of the

validity of the statute's particular beneficence. Lemon v. Kurtzman, 403 US 602, 617-19, 623 (1971)[3]. Otherwise, unintended circumvention would escape the First Amendment's unrelenting veto. The present grants must, therefore, be scrutinized for contingencies of this nature.

Of telling decisiveness here is the payment of the grants directly to the colleges unmarked in purpose. These features were decried in Levitt v. Committee for Public Education, 413 US 472, 480 (1973); Committee for Public Education v. Nyquist, 413 US 756, 774 (1973); and Lemon v. Kurtzman, supra, 403 US 602, 621 (1971). There, the potential of misuse was existent because of the lack of a definitive plan of application, such as the designation of worthy needs or of desired improvements, for example, professors' salaries, books, buildings and like objectives.

Presently the Act is simply a blunderbuss discharge of public funds to a church-affiliated or church-related college. There is only a single warning

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3. While Lemon and other cases, cited post, such as Allen, Levitt, Everson and Nyquist, deal with primary or secondary schools, the principles therein laid out are general in their appositeness.

of the forbidden use and that merely in a phrase of utmost generality: "sectarian purposes". Noteworthy, the funds could be devoted to the compensation of the theology faculty. One of the faculty members in each college is the chaplain. This is but one example of the overlap of academic and theological salaries. Beyond peradventure, save for the self-restraint of the college administors and without their faithful attention, the grants could well, though proscribed, go into secular and sectarian areas at the same time. These could be menial or professional services, or building and grounds maintenance, related to both purposes. Levitt v. Committee for Public Education, supra, 413 US 472, 479 (1973). Research discloses to me no comparable carte blanche power of expenditure permissibly conferred by a State upon church-affiliated or church-related institutions. Surely, that potential for abuse is here, and only through honesty has deflection of the money been avoided.

The infirmity of non-prescription of the objects of the State aid is exquisitely demonstrated in Tilton v. Richardson, 403 US 672 (1971). There the United States authorized grants to colleges for the construction of academic facilities except a facility to be used for sectarian purposes. The Government reserved a 20-year interest in the units to be built so as to insure enforcement of the proviso. The Court held that limiting the prohibition to 20

years opened the facility for utilization for any purpose after the expiration of 20 years, and for this reason the aid tolerated a grant of the post-20-year period for use for sectarian objects. This decision trenchantly confirms that possible utilization of public property in advancing religion is ipso facto inhibited.

III. The "sectarian purposes" outlawed by the Act, the fact findings in this case conclude, "must be interpreted as encompassing the study of religion or theology". As previously explained, all of the defendant colleges have an alive religion or theology department. At each of them certain courses in these subjects are mandatory. While the fact findings say that the two teachings are approached as complex and intriguing intellectual disciplines, it adds, "[h]owever, a department staffed mainly by clerics of the affiliated church and geared toward a limited array of the possible theology or religion courses affords a congenial means of furthering the secondary objectives of fostering religious experience". Another finding acknowledges:

> "Recognition of the academic freedom of these instructors does not necessarily lead to a conclusion that courses in the religion or theology departments at the five defendants have no overtones of indoctrination." (Accent added.)

Thus, obviously, the departments of theology have been quickened into a significant sectarian area of education. With a department so inspirited and with its staff and faculty composed of religious or theological clerics, a resulting expansion of the school of theology seems logically at once at hand. With this mounting potentiality, religious teaching might quite readily permeate and pervade the college. Consequently, the allocation of State moneys to include this growing religious segment could mean that this effectuation of the Act may equate it to a "law respecting an establishment of religion".

IV. Potentiality is also an assaying factor in measuring whether the Act's play within the colleges creates "an excessive government entanglement with religion". Lemon v. Kurtzman, supra, 403 US 602, 613-614; Walz v. Tax Commission, supra, 397 US 664, 674; Levitt v. Committee for Public Education, 413 US 472, 480-482 (1973); see also Committee for Public Education v. Nyquist, 413 US 756, 794 (1973). Instantly the possibility is real and manifold. This is attributable to the complete absence of any appointment of the objects of the Act's bounty when extended to church-affiliated or church-related entities. In this context, to be assured that none of the public funds kindle or fire religion and theology, a closer oversight is required of the appropriation and application of the grants than in secular schools. Thus unavoidably the State is drawn into

frequent and constant touch with the fiscal affairs of each college. This could easily generate controversy.

True, periodical reports may be expected of the colleges of the grants' use, with verification by accountants in audit analyses. But, I fear, the tracking down of the moneys would require exceptional safeguards against overflow of religion and theology into the purely academic curricula. This guardianship could lead to excessive entanglement of the State with the colleges.

The following summation from Lemon, 403 US 602, at 621-2 seems apt:

> "The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance. The government cash grants before us now provide no basis for predicting that comprehensive measures of surveillance and controls will not follow. In particular the government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state". (Accent added.)

It is but another risk of encroachment on the Act's ban.

Because of the potentialities posed throughout this dissent, I think the Act is unconstitutional when adapted to the three now-defendant colleges, despite the integrity of the latters' use of the moneys and despite the welcome help of such institutions in providing public education.

V. Recovery of payments already disbursed by the State is not in my judgment equitably demandable. The recipients relied in good faith on the State funds, and doubtlessly assumed obligations in anticipation of them. In my opinion this disposition of the reimbursement claim is sustainable. Lemon v. Kurtzman, 411 US 192 (1973).

In fine, I deferentially hold the view that an injunction should issue as prayed in the complaint, stopping future payments under the Maryland Act to the three defendant colleges.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JOHN C. ROEMER, III, et al.	:	
V.	:	CIVIL NO. 72-307-Y
BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND, et al.	:	

FINDINGS OF FACT

I

Four Maryland citizens and taxpayers have challenged the constitutionality of a state law under which public aid is given to non-profit private institutions of higher learning. Claiming that the statute, Art. 77A, § 65-70, Annotated Code of Maryland, violates the Establishment clause of the First Amendment, plaintiffs seek an injunction to prevent the state from paying aid pursuant to the Act and a declaration that all funds received by the recipient institutions be paid over to the state with interest. Defendants are the Governor, Comptroller and Treasurer of the State of Maryland, all of whom constitute the Board of Public Works of the State of Maryland, and five

of the 18 institutions of higher learning which are recipients of aid under the challenged statute.[1]

Plaintiffs originally coupled their Establishment claim with a contention that the statute violates the Free Exercise clause as well, and were originally joined in their suit by two organizations. The complaints of the two organizations were dismissed for lack of standing, and the Free Exercise claims of the four individual plaintiffs were similarly dismissed. As taxpayers, the remaining plaintiffs have standing to challenge the statute in question on Establishment grounds. Jurisdiction is based on 28 U.S.C. § 1331. A district court of three judges was convened pursuant to 28 U.S.C. § 2281 and 2284.

The challenged statute provides aid directly to each institution, in proportion to the number of associate or bachelors degrees awarded by it in the

1. Western Maryland College, College of Notre Dame, Mount St. Mary's College, Saint Joseph's College, and The Associated Professors of Loyola College in the City of Baltimore, Inc. (Loyola College). Western Maryland is affiliated with the Methodist Church. The other four defendants are affiliated with the Roman Catholic Church.

fiscal year next preceding the fiscal year in which payment is made.[2] The recipient institution "cannot be one awarding only seminarian or theological degrees," Art. 77A § 66(d), Annotated Code of Maryland, and state money cannot be used for "sectarian purposes", Art. 77A, § 68A, Annotated Code of Maryland.

II

The threshold factual question is a determination of the purpose of the legislative action. The purpose of this statute is clearly secular. It had its origin in an analysis of Maryland higher education done by the Maryland Council on Higher Education. Included in this analysis was a statistical description of the tremendous money savings to the state from the system of private colleges. The continuation of the aid program has been bolstered by a later report by the Council, which has administrative responsibility under the Act, concerning the uncertain nature of

2. In November, 1971, based on degrees awarded in 1970-71, 17 recipients received some 1.7 million dollars in aid, the five defendants receiving approximately $520,000. The following year, 1.8 million dollars was awarded to 18 recipients. Of that sum, $603,000 was placed in an escrow account for the defendants pending the outcome of this litigation.

private college finances, even with the state aid program. State aid to church-related colleges is not necessarily sectarian in purpose. Tilton v. Richardson, 403 U.S. 672, 678-679 (1971). The state purpose here is clearly not.

Despite a secular purpose, a state law violates the Establishment clause if the primary effect is to advance religion. An aid program need not have the primary effect of advancing religion unless recipient institutions are so permeated by religion that the secular side cannot be separated from the sectarian. The defendants here are not in that pervasively sectarian category.

Not only has there been no showing that religion slants the conduct of classes at the defendant institutions, this litigation has demonstrated the opposite to be true. The most potent evidence in this regard is the uncontroverted testimony of numerous members of the faculty of each defendant. They feel no religious pressures, by anyone, on their classroom presentation or their selection of texts and course materials.[3] Even a former

3. The Court has been presented with book lists for four of the five defendants. In each instance, for courses covering the spectrum of a liberal arts program, the book lists seem standard fare, and plaintiffs did not point out counter examples. The fifth defendant, Mt. St. Mary's, produced testimony that selection of textbooks was within the discretion of the individual teacher.

faculty member of Mt. St. Mary's called by plaintiffs to testify to his disagreement with certain aspects of the administration of that college, agreed that his freedom to conduct classes without regard to religious considerations had never been impinged. Each defendant subscribes to the 1940 Statement of Principles on Academic Freedom of the American Association of University Professors, and each obviously abides by it.

Plaintiffs have demonstrated that there is a practice at several of the defendants of starting classes with prayer. There is no such practice at Western Maryland College, and the extent of prayer in class varies widely among the four remaining defendants. At Loyola and Mt. St. Mary's, the percentage of classes which start with prayer is miniscule. At St. Joseph's College and Notre Dame, those classes which do start with prayer often do not utilize what would be called a traditional form of prayer, and students join in or not at their option.

The figures on the number of instructors who begin class with prayer and the number who do not bear out the testimony of witnesses for each defendant that there is no actual college policy encouraging prayer in class. It is treated as a facet of the instructor's academic freedom. Moreover, plaintiffs failed to establish that beginning a class with prayer in

any way diminishes the atmosphere of intellectual freedom which marks these colleges. In fact, at St. Joseph's College, the only defendant at which a majority of classes start with prayer, a Maryland education department group which monitored the teachers education program at the College saw no evidence of religion entering into any elements of that program. It appears that prayer in class is as peripheral to the subject of religious permeation of an institution as are the facts that some instructors wear clerical garb, and some classrooms have religious symbols. None of these facts impairs the clear and convincing evidence that courses at each defendant are taught "according to the academic requirements intrinsic to the subject matter and the individual teacher's concept of professional standards." Tilton v. Richardson, supra, 403 U.S. 681.

A finding that there is substantial academic freedom for individual instructors leads to a conclusion that religion does not permeate the secular side of the college only if religion plays no part in hiring decisions. The faculty hiring picture is complex. At Notre Dame and Mt. St. Mary's, no inquiry is made into an applicant's religion. At Western Maryland there is no formal inquiry, but a former President often inquired, in order to fully appreciate the applicant's background. A similar rationale supports the religious preference blanks on the application form

for Loyola. In addition, Loyola attempts to recruit to its faculty each year two members of a religious order which once staffed a college recently merged into Loyola. At both Notre Dame and St. Joseph's College, members of religious orders of women receive less than full faculty salary, and although budgetary considerations lead the colleges to favor a member of an order, the main criteria for hiring is academic quality.

Despite this variety of hiring situations, two things are common to each defendant. Hiring decisions are effectively low-level and participatory. And at no defendant was there such dominance on the faculty by one religious group that hiring bias would escape the attention of members of other religious groups. Even more importantly, the faculty members of each defendant, many of whom testified, impress the Court as professionals who value academic freedom and see no place for religious bias in liberal arts education. If there were an effort by any defendant to stack its faculty with members of a particular religious group, it could not have escaped the attention of the present faculty, and they would have complained to their local chapter of the American Association of University Professors, or to the college administration. Plaintiffs showed no instance of either.

Though the above represents a finding as to faculty hiring generally,

the hiring patterns for religion or theology departments are a special case and present a unique problem. All five defendants staff their religion or theology departments chiefly with clerics of the affiliated church. At two defendants, Western Maryland and Mt. St. Mary's, all members of the religion or theology faculty are clerics. The problem presented by the make-up of these departments is obvious. Recognition of the academic freedom of these instructors does not necessarily lead to a conclusion that courses in the religion or theology departments at the five defendants have no overtones of indoctrination. Moreover, an examination of book lists in these courses is relatively meaningless. There will necessarily be "religious" titles, and a court cannot make a finding that certain texts indoctrinate and certain inquire.

Therefore, although the Court finds that the extent of academic freedom at each defendant belies a finding that any of them are "pervasively sectarian," Hunt v. McNair, 41 USLW 5174, 5177 (June 25, 1973), the Court is unable to characterize the manner in which theology and religion courses are conducted. Those courses notwithstanding, the extent of academic freedom at each institution, coupled with the more intangible factors that determine an institution's "atmosphere," discussed below, lead to a conclusion that each defendant is "characterized by an atmosphere of academic freedom rather than religious indoctrination," Tilton v. Richardson,

supra, 403 U.S. 681, and therefore that the primary effect of aid to these defendants is not to advance religion.

III

To determine whether the statute's administration entangles the state with religion, it is necessary to first determine whether religious indoctrination is a substantial purpose or activity of the recipients, and then consider the nature of the aid program involved. The record and testimony in this case amply support a finding that at none of the defendants is religious indoctrination a substantial purpose or activity. Plaintiffs did demonstrate that each of the defendants, with the exception of St. Joseph's College, have, or recently had, quotas for membership on the governing board based on religion or membership in a religious order. Moreover, for each defendant the religious affiliation of the college would be readily apparent to any prospective applicant who took the time to read the catalogue. Such formal matters are relevant, but are not controlling when more reliable indications of the "atmosphere" of the institution evoke a different picture. Hunt v. McNair, supra.

With the exception of Western Maryland, none of the defendants receive aid from or make reports to an institutional church. Western Maryland receives annual stipends from the Methodist Church in a very modest

amount, and makes annual statistical reports to the national Methodist Church. There is no effort by the Church to parlay the funds or reports into control over the college. Similarly, though the local head of the Catholic Church is an ex officio member of the Mt. St. Mary's Board of Trustees, no instance of entry of Church considerations into college decisions was shown.

No aspect of the student conduct code at any defendant institution has any religious content.[4]

The great majority of students at each of the institutions affiliated with the Catholic Church are Catholic, and Methodists comprise the largest single religious group at Western Maryland. However, thorough analysis of the student admission and recruiting criteria of each defendant demonstrates that the student bodies are chosen without regard to religion.

Religious exercises are held on the campus of each defendant, though none of the defendants require attendance at any religious exercise.[5] Each defendant has

4. An ambiguous reference in Mt. St. Mary's Code was shown not to have been inspired by religious considerations.

5. Though the Baccalaureate ceremony at each defendant is religious, there seems to be no real compulsion for students to attend.

a chaplaincy program,[6] and at each defendant the principal chaplain is a clergyman of the affiliated church. The Campus Ministry at Loyola, the chaplain and the Religious Life Council at Western Maryland, and the chaplain programs at the remaining defendants, each serve to encourage spiritual development of the students, which the Court finds to be one secondary objective of each defendant. Representatives of each defendant candidly admitted that their institution is interested in encouraging spiritual interests. These admissions complement the Court's conclusion drawn from other aspects of the evidence and testimony. Though some of the defendants seem more caught up in this idea than others, at none of these institutions does this encouragement go beyond providing the opportunities or occasions for religious experience.

The theology and religion courses of each defendant must be viewed in the light of that shared objective. While most of the defendants do not offer majors in religion or theology, each maintains a vigorous religion or theology department. The primary concern of these departments, either admittedly or by the obvious thrust of the courses, is Christianity. As already noted, the departments are

6. Evidence adduced at trial indicates that a majority of American liberal arts colleges have chaplains.

staffed almost entirely with clergy of the affiliated church. At each of the defendants, certain of these courses are required.7

The Court has already stated its view that it is neither legally empowered nor genuinely able to characterize the manner in which theology and religion are studied at these schools. It may be that at each the subjects are approached as complex and intriguing intellectual disciplines. However, a department staffed mainly by clerics of the affiliated church and geared toward a limited array of the possible theology or religion courses affords a congenial means of furthering the secondary objective of fostering religious experience. Only the clearest indication that the religion or theology department is an amalgam of people interested in the study of the religious phenomenon or experience, rather than in experiencing religion, justifies state support of the department in the light of that secondary objective. There has been no such indication for any of these defendants. However, the Court's findings as to the chaplaincy program

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7. Western Maryland combines philosophy and religion in one department, and permits students to select a philosophy rather than a religion course. The department is wholly staffed by Methodist ministers.

and the religion or theology courses do not impair the general finding that religious indoctrination is not a substantial purpose or activity of any of these defendants.

With that general finding in mind, a description of the administration of the statute is in order.

Primary administrative responsibility for the aid program is vested in the Maryland Council for Higher Education. That responsibility is complemented by the Council's other responsibilities for higher education in Maryland, which do not derive from the challenged statute but do give the Council and its professional staff considerable expertise with regard to each recipient.

The Act prescribes two levels of screening. The first is a pre-eligibility determination based primarily on the Act's requirement that aid not go to institutions awarding primarily theological or seminary degrees. Several institutions have been disqualified in this manner, and there has been no serious suggestion that institutions found eligible violate the standard, or that this determination entangles the Council in religion.

The second level of screening is a determination of whether state funds have been improperly used. After the program was in operation and one year's funds awarded, the statute was amended

to prohibit the use of state funds for "sectarian purposes." Chap. 534, 1972 Laws of Maryland, Art. 77A, § 68A, Annotated Code of Maryland (1969 Replacement Vol.). That statutory stricture is implemented through requirements of verification by the college president before receipt that funds will not be improperly expended, and verification one year thereafter that funds have not been improperly used. The Council requires sufficient detail, through follow-up on the usage description which accompanies the second verification, to determine whether the expenditure was for sectarian use. (The pre-amendment funds awarded for degrees conferred during the 1970-1971 academic year were never subjected to this second level of screening.)

The usage verification and the normal annual accounting which each college conducts obviate the need for state post-audit analysis in every case. Such analysis is available when needed, however. State auditors could accomplish a post-audit analysis, using accepted accounting techniques, in one day or less.[8] This mechanical accounting of state grant expenditures is not entangling. It is done now for federal programs by these same institutions. It is quick and non-judgmental.

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8. Recipients could minimize even this nominal degree of auditing by designating a special account for the state grant, and locating all supporting documents for that account in one place.

The administering body has not yet developed a systematized follow-up procedure to insure that state grants made now are not converted to sectarian or religious usage some years hence. The Act places no time limit on its prohibition of sectarian usage, however, Art. 77A, § 68A, and testimony disclosed that the administering body clearly understands that sectarian usage is forbidden, no matter when it occurs. In the face of the Act's prohibition and the administering body's understanding of it, the Court cannot surmise that the follow-up procedures which are eventually routinized will prove inadequate.

Except for this follow-up monitoring, there is no need for additional supervision by the Council over the recipients. The Council has shown no indication to enmesh itself unnecessarily in the recipients' affairs. The Act does not require administrative entangling, there is no entanglement in the present procedures, and no cause to speculate that the Council will redefine its responsibilities to create problems in the future.

The evidence indicates that there are institutions, which are able to pass the state's initial screening, at which the study of religion or theology may become an instrument for strengthening the students' religious life. Yet the Council has taken the position that state funds may be used for religion and theology courses. The Court's conclusion that this is improper as to

these defendants has already been noted. Were the Council to make a yearly inquiry similar to that which the Court has made, the risk of the Council becoming entangled with religion would be great. To avoid a requirement that the state minutely scrutinize each recipient's religious studies program or otherwise enmesh itself in potentially religious matters, the Act must be administered so as to prevent any state funds from supporting the religious studies or theology programs at any institution. "Sectarian purposes," as that term is used in Art. 77A, § 68A, must be interpreted as encompassing the study of religion or theology.[9]

IV

Each defendant received a state grant on November 5, 1971, based on degrees conferred during the academic year 1970-1971. Art. 77A, § 68A and the corresponding state monitoring procedure were were not added to the program until 1972. Three of the five defendants effectively commingled the 1971 grant with general college operating funds. Loyola, by contrast, used the state money solely for scholarships. Mount St. Mary's employed restricted funds

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9. The Court does not believe that the study of religion or theology is necessarily sectarian, and makes no finding as to whether it is sectarian at any of the defendant institutions.

accounting, and demonstrated that no part of the grant, except the interest it earned, was used for sectarian purposes.

The consolidated findings of fact herein are made following the conclusion of the evidence submitted during the trial and following argument from all counsel on the proposed findings, and are intended to form the findings submitted to the three-judge court.

/s/ Joseph H. Young
United States District Court

MARYLAND ANNOTATED CODE
§§65-69 IN EFFECT ON DATE OF JUDGMENT

§65. Board of Public Works authorized to make payments.

The Board of Public Works is authorized to apportion for each fiscal year, commencing with July 1, 1971, and to pay to any private institution of higher education within the State of Maryland which meets the requirements set forth in §66 of this subtitle, upon application by the institution, such amounts of State aid as are authorized to be paid by §67 of this subtitle. (1971, ch. 626.)

§66. Qualifications for aid.

In order to qualify for State aid apportionments pursuant to this subtitle, any institution of higher education must meet each of the following requirements:

(a) The institution must be a nonprofit private college or university which has been accredited by the State Department of Education;

(b) The institution must have been established in this State prior to July 1, 1970;

(c) The institution must maintain

one or more earned degree programs, culminating in an associate of arts or baccalaureate degree;

(d) The institution cannot be one awarding only seminarian or theological degrees;

(e) The institution shall submit all new programs and major alterations of programs to the Maryland Council for Higher Education for its review and recommendation regarding their initiation. (1971, ch. 626; 1972, ch. 483; 1974, ch. 585, §1.)

§67. Computation of amount.

For fiscal year 1976 and succeeding fiscal years, the amount of the annual apportionment to each institution meeting the requirements of §66 of this article shall be computed by multiplying (1) the number of full-time equivalent students enrolled by the institution during the fall semester of the fiscal year next preceding the fiscal year for which the apportionment is made, as determined by the Maryland Council for Higher Education, by (2) an amount equal to 15 percent of the State's general fund per full-time equivalent pupil appropriation to the four year public colleges in Maryland for the preceding fiscal year. Full-time equivalent students enrolled in seminarian or

theological academic programs shall be excluded from the computation. (1971, ch. 626; 1973, ch. 716; 1974, ch. 585, §§2, 3.)

§68. Administration of program.

The Board of Public Works assisted by the Maryland Council for Higher Education shall adopt criteria and procedures, not inconsistent with this subtitle, for the implementation and administration of the aid program provided for by this subtitle, including but not limited to criteria and procedures for the submission of applications for aid under this subtitle, for the verification of degrees conferred by the applicant private institutions of higher education, for the submission of reports or data concerning the utilization of these moneys by such institutions, and for the method and times during the fiscal year for paying the aid provided for by this subtitle. (1971, ch. 626; 1972, ch. 534.)

§68A. Money not to be used for sectarian purposes.

None of the moneys payable under this subtitle shall be utilized by the institutions for sectarian purposes. (1972, ch. 534.)

§69. Severability.

If any parts of this subtitle, or any particular payments or payments to any particular types of institutions

pursuant to this subtitle, shall be held to be unconstitutional or invalid for any reason, such unconstitutionality or invalidity shall not affect the remaining parts of this subtitle, and shall not affect any other payments or payments to any other types of institutions pursuant to this subtitle, the General Assembly hereby declaring that it would have enacted the remaining parts of this subtitle or would have authorized the remaining payments or payments to the remaining types of institutions, if such unconstitutionality or invalidity had been known; and to this end, all parts, sections, and parts of sections of this subtitle, and all administrative actions pursuant to this subtitle, are declared to be severable. (1971, ch. 626.)

LAWS OF MARYLAND 1973,
CHAPTER 716

The amount of the annual apportionment to each institution meeting the requirements of §66 of this subtitle shall be computed by multiplying by two hundred dollars the number of earned associate of arts degrees, and by five hundred dollars (1) the number of earned bachelor's, and (2), to the extent that sufficient funds are provided in the annual State budget, the number of advanced degrees beyond baccalaureate, including first professional degrees, conferred in this State by such institution during the fiscal year next preceding the fiscal year for which such apportionment is made. To the extent that sufficient funds are not provided in the State budget for the full cost of (2) above, the amount per degree thereof shall be reduced on a pro rata basis. There shall be excluded from any such computation the number of seminarian or theological degrees conferred by the institution or any degree which is awarded in substitution of a previously earned degree. (1971, ch. 626; 1973, ch. 716.).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JOHN C. ROEMER, III,
EDWARD E. DOERR,
KENNETH A. STEVENS, and
CYNTHIA KOONCE MILLER

v.

BOARD OF PUBLIC WORKS OF
THE STATE OF MARYLAND,
MARVIN MANDEL, Governor,
LOUIS L. GOLDSTEIN,
Comptroller, JOHN A. LUETKEMEYER, Treasurer,
WESTERN MARYLAND COLLEGE,
a Maryland corporation,
COLLEGE OF NOTRE DAME OF
MARYLAND, INC., a Maryland
corporation, MOUNT SAINT
MARY'S COLLEGE, a Maryland
corporation, SAINT JOSEPH
COLLEGE AT EMMITSBURG,
MARYLAND, INC., a Maryland
corporation, and THE
ASSOCIATED PROFESSORS OF
LOYOLA COLLEGE IN THE CITY
OF BALTIMORE, INC., a
Maryland corporation.

Civil No. 72-307-Y

: : : : : : : : :

JUDGMENT

The above entitled case came on for hearing before the Court, Honorable Albert V. Bryan, Circuit Judge, and R.

Dorsey Watkins and Joseph H. Young, United States District Judges, presiding, and the issues having been heard and a decision having been duly rendered, Bryan, Circuit Judge, dissenting in an unsigned opinion, it is

ORDERED AND ADJUDGED:

1. That Md. Ann. Code Art. 77A, Sec. 65 et seq. is constitutional on its face and as applied.

2. That Plaintiff's motion for injunction of the application of Article 77A, Sec. 65 et seq. be, and the same is, hereby DENIED.

3. That Plaintiff's motion for refund of aid program be, and the same is, hereby DENIED.

Dated at Baltimore, Maryland this 21st day of October, 1974.

Paul R. Schlitz, Clerk

By: /s/ R. Bruce McElhone
R. Bruce McElhone
Deputy Clerk

APPROVED this 21st day of October, 1974.

[164] Filed October 21, 1974

/s/ R. Dorsey Watkins
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JOHN C. ROEMER, III,
et al,
Plaintiffs

v. CIVIL NO.

BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND, et al, 72-307-Y
Defendants

: : : : : : : : : :

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that John C. Roemer, III, Edward E. Doerr, Kenneth A. Stevens and Cynthia Koonce Miller, plaintiffs-appellants, are taking an appeal to the Supreme Court of the United States from the judgment entered against them on October 21, 1974, denying the injunctive and other relief prayed.

This appeal is taken pursuant to 28 U.S.C. §1253.

/s/ Lawrence S. Greenwald
Lawrence S. Greenwald
1200 Garrett Building
Baltimore, Maryland 21202
752-4567

Attorney for Plaintiffs-Appellants

Supreme Court, U. S.
FILED
MAY 3 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

74-
No. 730

JOHN C. ROEMER, III, EDWARD E. DOERR, KENNETH A. STEVENS, and CYNTHIA KOONCE MILLER,

Appellants,

—v.—

BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND; MARVIN MANDEL, Governor; LOUIS L. GOLDSTEIN, Comptroller; JOHN A. LUETKEMEYER, Treasurer; COLLEGE OF NOTRE DAME OF MARYLAND, INC.; MOUNT SAINT MARY'S COLLEGE; SAINT JOSEPH COLLEGE AT EMMITSBURG, MARYLAND, INC.; and THE ASSOCIATED PROFESSORS OF LOYOLA COLLEGE IN THE CITY OF BALTIMORE, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

APPENDIX

JURISDICTIONAL STATEMENT FILED DECEMBER 11, 1974
PROBABLE JURISDICTION NOTED FEBRUARY 18, 1975

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/1 Printed in Appendix to Jurisdictional Statement, beginning at page A-1.

/2 Printed in Appendix to Jurisdictional Statement, beginning at page A-57.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JOHN C. ROEMER, III, EDWARD E. DOERR, KENNETH A. STEVENS, and CYNTHIA KOONCE MILLER,	*	
v.	*	
BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND, MARVIN MANDEL, Governor, LOUIS L. GOLDSTEIN, Comptroller, JOHN A. LUETKEMEYER, Treasurer, WESTERN MARYLAND COLLEGE, a Maryland corporation, COLLEGE OF NOTRE DAME OF MARYLAND, INC., a Maryland corporation, MOUNT SAINT MARY'S COLLEGE, a Maryland corporation, SAINT JOSEPH COLLEGE AT EMMITSBURG, MARYLAND, INC., a Maryland corporation, and THE ASSOCIATED PROFESSORS OF LOYOLA COLLEGE IN THE CITY OF BALTIMORE, INC., a Maryland corporation	*	CIVIL NO. 72-307-Y (Attorneys omitted in printing)

* * * * * * * *

RELEVANT DOCKET ENTRIES

March 27, 1972
(1) Complaint and exhibit 1, filed.

June 1, 1972
(11) Answer of Defendant, The Associated Professors of Loyola College in the City of Baltimore, Inc., filed.

June 1, 1972
(13) Answer of Defendant Mount St. Mary's College, filed.

December 13, 1972
(32) Memorandum Opinion and Order (Young, J.) "dismissing" that part of complaint which alleges a free exercise violation; "dismissing" complaint as to Plaintiffs American Civil Liberties Union of Maryland and Protestants and Other Americans United for Separation of Church and State; and "denying" motions of Defendants to dismiss for failure to join persons needed for just adjudication, filed. (copies mailed 12/13/72)

December 14, 1972
(33) Judgment entered in favor of Defendants against Plaintiffs American Civil Liberties Union of Maryland and Protestants and Other Americans United for Separation of Church and State, a/k/a Americans United For Separation of Church and State, for costs, Order (Clerk), filed. (copies

mailed 12/14/72)

January 2, 1973
(37) Answer of Defendant Western Maryland College, filed.

January 4, 1973
(38) Answer of defendant, College of Notre Dame of Maryland, Inc., filed.

January 4, 1973
(40) Answer of defendants, Board of Public Works of the State of Maryland, Marvin Mandel, Governor, Lewis L. Goldstein, Comptroller and John A. Leutkemeyer, Treasurer of the State of Maryland, filed.

January 10, 1973
(42) Answer of Defendant Saint Joseph College of Emmitsburg, Md., Inc., filed.

July 12, 1973
(122) Transcript of proceedings before Young, J. on May 29, 30, 31, June 4, 5, 11, 12, 18, 19, 22, 25 and 26, 1973 (12 volumes) (Filed separately)

December 14, 1973
(145) Motion of plaintiffs for preliminary injunction as to defendant Board of Public Works of the State of Maryland, affidavit, attachment, and memo in support thereof. (Cys. sent to Judge)

January 31, 1974
(155a) Order (Young, J.) "Denying" motion of plaintiffs for preliminary injunction as to Board of Public Works of State of Maryland. (Cys. mailed 2/21/74)

October 16, 1974
(163) Memorandum Opinion and Order (Young, J., and Watkins, J.) 1) That Md. Ann. Code art. 77A, Sec. 65 et seq. is constitutional on its face and as applied; 2) That Plaintiffs' Motion for injunction of the application of Article 77A, Sec. 65 et seq. be, and the same is, hereby DENIED: and 3) That Plaintiff's Motion for refund of aid program be, and the same is, hereby DENIED: Dissent by Bryan, Circuit Judge (unsigned), and copy of Findings of Fact filed January 18, 1974. (Cys. mailed 10/16/74)

October 21, 1974
(164) JUDGMENT: 1) That Md. Ann. Code art. 77A, Sec. 65 et seq. is constitutional on its face and as applied; 2) That Plaintiff's motion for injunction of the application of Article 77A, Sec. 65 et seq. be, and the same, is hereby DENIED: and 3) That Plaintiff's motion for refund of aid program be, and the same is, hereby DENIED, Order (Clerk), with Approval of Court (Watkins, J.) thereon. (Cys. mailed 10/22/74)

October 25, 1974
(165) Notice of Appeal of Plaintiffs to the Supreme Court of the United States.

October 25, 1974
(166) Motion of Plaintiffs for injunction pending appeal, statement of points and authorities in support thereof, and request for hearing. (Copies mailed to three Judges - per Greenwald)

November 15, 1974
(173) Order (Watkins, J., and Young, J.) "DENYING" Motion of plaintiffs for Injunction pending Appeal; Bryan, Cir. J., concurring. (Cys. mailed 11/15/74)

November 27, 1974
(174) Request of Plaintiffs to certify and transmit record, as set forth.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

(title omitted in printing)

* * * * *

COMPLAINT

1. This is a civil action by the individual plaintiffs on their own behalf and on behalf of all others similarly situated and by the organizational plaintiffs for a preliminary and permanent injunction against the apportionment and payment of funds of the State of Maryland to sectarian, educational institutions which are engaged in the teaching and practice of religion and a substantial purpose or activity of which is the inculcation of religious values and against the use of such funds by such institutions. This is also an action for a declaratory judgment that the law of the State of Maryland known as "Aid to Non-Public Institutions of Higher Education", Maryland Code, Article 77A, §§65-69, hereinafter sometimes called "the Act", is unconstitutional in that it violates the first and fourteenth amendments of the United State Constitution and that any funds paid under the Act to such sectarian, educational institutions are required to be returned to the State of Maryland.

2. Jurisdiction is conferred upon this court by 28 U.S.C. §§1331, 1343, 2281, and 2284.

3. This action raises important federal questions under the United States Constitution, and the amount in controversy exceeds $10,000.00, exclusive of interest and costs.

4. The American Civil Liberties Union of Maryland and Americans United for Separation of Church and State share as common objectives the preservation of the doctrine of separation of church and state and opposition to the use of public funds for the support of sectarian, educational institutions.

5. The individual plaintiffs are all citizens of the United States and citizens and taxpayers of the State of Maryland.

6. The defendant Marvin Mandel is the governor of Maryland. The defendant Louis L. Goldstein is the comptroller of Maryland. The defendant John A. Luetkemeyer is the treasurer of Maryland. Said defendants constitute and are sued herein as the defendant Board of Public Works of the State of Maryland.

7. Each of the institutional defendants is a sectarian, educational institution which is engaged in

the teaching and practice of religion and a substantial purpose of which is the inculcation of religious values. Each of the institutional defendants is controlled in whole or in part by a particular church. Each of the institutional defendants compels obedience to the doctrines and dogmas of a particular religion, requires instruction in theology and doctrine, and does everything it can to propagate a particular religion.

8. On May 24, 1971, the governor of Maryland signed into law the Act titled "Aid to Non-Public Institutions of Higher Education", Maryland Code, Article 77A, §§65-69 (originally designated §§64-68). The Act purports to authorize the defendant Board of Public Works to apportion for each fiscal year commencing with July 1, 1971, and to pay any private institution of higher education with the State of Maryland which meets designated requirements, upon application by such institution, such amounts of state aid as are authorized by the Act. The full text of the Act is set forth in Exhibit 1 attached hereto. On information and belief, plaintiffs allege that the funds from which such state aid is derived are general tax revenues of the State of Maryland, including taxes paid by the individual plaintiffs and others similarly situated.

9. On information and belief the institutional defendants have received payments from the defendant Board of Public Works pursuant to the Act, as follows: Western Maryland College -- $90,500; The Associated Professors of Loyola College in the City of Baltimore, Inc. -- $157,000; College of Notre Dame, Inc. -- $90,000; Mount Saint Mary's College -- $117,500; Saint Joseph College at Emmitsburg, Maryland, Inc. -- $65,000.

10. The Act on its face and as applied by the defendant Board of Public Works is a law respecting an establishment of religion and prohibiting the free exercise thereof in violation of the first amendment to the United States Constitution, as made applicable to the states by the fourteenth amendment.

11. This action involves a genuine case or controversy between the plaintiffs and the defendants.

12. The class represented by the individual plaintiffs is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the representative parties are typical of the claims or defenses of the class; and the representative parties will fairly and adequately protect the interests of the class.

13. The plaintiffs have no adequate remedy at law, and will suffer irreparable damage unless a preliminary and permanent injunction are granted.

Wherefore, the plaintiffs pray that the following relief be granted:

a. That the Act be declared unconstitutional on its face and as applied.

b. That the defendants Board of Public Works, Marvin Mandel, governor, Louis L. Goldstein, comptroller, and John A. Luetkemeyer, treasurer, be enjoined during the pendency of this action and permanently from apportioning and paying state aid pursuant to the Act to the institutional defendants.

c. That the institutional defendants be enjoined during the pendency of this action and permanently from using any funds received pursuant to the Act.

d. That a declaration be issued stating that all funds received by the institutional defendants pursuant to the Act, together with interest earned, are required to be returned to the defendant Board of Public Works.

e. Judgment for costs in favor of the plaintiffs.

f. Such other and further relief as the court may deem just and proper.

/s/

EXHIBIT 1

MARYLAND CODE,
ARTICLE 77A, §§65-69

AID TO NONPUBLIC
INSTITUTIONS OF
HIGHER EDUCATION

§65. Board of Public Works authorized to make payments.

The Board of Public Works is authorized to apportion for each fiscal year, commencing with July 1, 1971, and to pay to any private institution of higher education within the State of Maryland which meets the requirements set forth in §66 of this subtitle, upon application by the institution, such amounts of State aid as are authorized to be paid by §67 of this subtitle. (1971, ch. 626).

§66. Qualifications for aid.

In order to qualify for State aid apportionments pursuant to this subtitle, any institution of higher education must meet each of the following requirements:

(a) The institution must be a nonprofit private college or university which has been accredited by the State Department of Education; and which are members of or in recognized candidacy with the Middle States Association

of Colleges and Secondary Schools;

(b) The institution must have been established in this State prior to July 1, 1970;

(c) The institution must maintain one or more earned degree programs, culminating in an associate of arts or baccalaureate degree;

(d) The institution cannot be one awarding only seminarian or theological degrees. (1971, ch. 626.)

§67. Computation of amount.

The amount of the annual apportionment to each institution meeting the requirements of §§66 of this subtitle shall be computed by multiplying by two hundred dollars the number of earned associate of arts degrees, and by five hundred dollars the number of earned bachelor's degrees, conferred in this State by such institution during the fiscal year next preceding the fiscal year for which such apportionment is made. There shall be excluded from any such computation the number of seminarian or theological degrees conferred by the institution or any degree which is awarded in substitution of a previously earned degree. (1971, ch. 626.)

§68. Administration of program.

The Board of Public Works is authorized to adopt criteria and procedures, not inconsistent with this subtitle, for the implementation and administration of the aid program provided for by this subtitle, including but not limited to criteria and procedures for the submission of applications for aid under this subtitle, for the verification of degrees conferred by the applicant private institutions of higher education, for the submission of reports or data by such institutions, and for the method and times during the fiscal year for paying the aid provided for by this subtitle. (1971, ch. 626.)

§69. Severability.

If any parts of this subtitle, or any particular payments or payments to any particular types of institutions pursuant to this subtitle, shall be held to be unconstitutional or invalid for any reason, such unconstitutionality or invalidity shall not affect the remaining parts of this subtitle, and shall not affect any other payments or payments to any other types of institutions pursuant to this subtitle, the General Assembly hereby declaring that it would have enacted the remaining parts of this subtitle or would have authorized the remaining payments or payments to remaining types of institutions, if such unconstitutionality or invalidity had been known; and to this end, all parts, sections, and parts of sections

of this subtitle, and all administrative actions pursuant to this subtitle, are declared to be severable. (1971, ch. 626.)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

(title omitted in printing)

* * * * *

MOTION FOR
PRELIMINARY INJUNCTION

Plaintiffs move the court for a preliminary injunction enjoining the defendant Board of Public Works of the State of Maryland from paying any funds pursuant to Maryland Code, Article 77A, §§65-69 to the defendants The Associated Professors of Loyola College in the City of Baltimore, Inc., and Western Maryland College.

Unless restrained by this court, the defendant Board of Public Works intends to pay amounts to the aforesaid defendants based upon graduate degrees awarded by said institutions, retaining in escrow amounts based upon undergraduate degrees. Such payment will result in irreparable injury to the plaintiffs by depriving them of rights guaranteed by the First and Fourteenth Amendments against state action predicated upon a law respecting the establishment of religion.

An affidavit and memorandum in support of this motion are attached.

Plaintiffs believe that 28 U.S.C. §2281 requires that a three-judge panel determine this motion.

/s/

(Supporting affidavit and memorandum and certificate of service omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

(title omitted in printing)

* * * * *

ORDER

Having considered the Plaintiffs' Motion for Preliminary Injunction and the replies thereto, and after hearing the parties in open court, and it appearing that the Court lacks jurisdiction of the subject-matter of said Motion, it is this 31st day of January, 1974

ORDERED that the Motion for Preliminary Injunction be and the same is hereby DENIED.

/s/
United States District Judge

Supreme Court, U. S.
FILED
JAN 10 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-730

JOHN C. ROEMER, III, EDWARD E. DOERR, KENNETH A. STEVENS, AND CYNTHIA KOONCE MILLER,

Appellants,

v.

BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND; MARVIN MANDEL, GOVERNOR; LOUIS L. GOLDSTEIN, COMPTROLLER; JOHN A. LUETKEMEYER, TREASURER; WESTERN MARYLAND COLLEGE; COLLEGE OF NOTRE DAME OF MARYLAND, INC.; MOUNT SAINT MARY'S COLLEGE; SAINT JOSEPH COLLEGE AT EMMITSBURG, MARYLAND, INC.; AND THE ASSOCIATED PROFESSORS OF LOYOLA COLLEGE OF THE CITY OF BALTIMORE, INC.,

Appellees.

ON APPEAL FROM A UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

MOTION TO AFFIRM OF ST. JOSEPH COLLEGE AT EMMITSBURG, MARYLAND, INC.

GEORGE T. TYLER,
1600 Maryland Nat'l Bank Bldg.,
Baltimore, Maryland 21202,
Counsel for Appellee.

The Daily Record Co., Baltimore, Md. 21202

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IN THE

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OCTOBER TERM, 1974

No. 74-730

JOHN C. ROEMER, III, EDWARD E. DOERR, KENNETH A. STEVENS, AND CYNTHIA KOONCE MILLER,
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BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND; MARVIN MANDEL, GOVERNOR; LOUIS L. GOLDSTEIN, COMPTROLLER; JOHN A. LUETKEMEYER, TREASURER; WESTERN MARYLAND COLLEGE; COLLEGE OF NOTRE DAME OF MARYLAND, INC.; MOUNT SAINT MARY'S COLLEGE; SAINT JOSEPH COLLEGE AT EMMITSBURG, MARYLAND, INC.; AND THE ASSOCIATED PROFESSORS OF LOYOLA COLLEGE OF THE CITY OF BALTIMORE, INC.,
Appellees.

ON APPEAL FROM A UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

MOTION TO AFFIRM OF ST. JOSEPH COLLEGE AT EMMITSBURG, MARYLAND, INC.

Appellee, Saint Joseph College at Emmitsburg, Maryland, Inc., pursuant to Rule 16 of the Supreme Court of the United States, moves the Court to affirm the judgment of the United States District Court of three judges for the District of

Maryland, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

OPINIONS BELOW

The opinion of the District Court of three judges, Bryan J., dissenting, was issued October 16, 1974. It is set forth in the Appendix of Appellants' Jurisdictional Statement.[1] Findings of fact were filed November 30, 1973; amended findings of fact were filed January 18, 1973 and were included by the court below as an appendix to its opinion. The findings of fact of the District Court are set forth in the Appendix at A. 35. The opinion and findings have not been reported.

JURISDICTION

Jurisdiction of the court below is grounded upon Title 28, United States Code, Section 1331. A District Court of three judges was convened pursuant to Title 28, United States Code, Section 2282 and 2284.

Judgment against appellants was entered on October 21, 1974 in the United States District Court for the District of Maryland and notice of appeal was filed in that court by appellants on October 25, 1974.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253.

STATUTES INVOLVED

The Maryland law involved is Chapter 626, Acts of 1971 (entitled "Aid to Non-Public Institutions of Higher Education"); as amended by Chapters 483 and 534, Acts of 1972

[1] All references hereinafter to the "Appendix" shall refer to the Appendix of Appellants' Jurisdictional Statement. Pages of that Appendix are cited as "A. 1", "A. 2", etc.

and Chapter 716, Acts of 1973. The statute, as amended, is codified in Article 77A, §§65-70, Annotated Code of Maryland (1974 Cumulative Supplement) (A. 52-55).

QUESTIONS PRESENTED

I. Should this Court affirm the judgment below where the Maryland District Court of three judges has correctly applied the constitutional principles and specific criteria established by this Court to determine whether public aid to church-related colleges violates the Establishment Clause?

II. Was the Maryland District Court of three judges correct in holding that the Maryland statute does not have the primary effect of advancing religion?

III. Was the Maryland District Court of three judges correct in holding that the Maryland aid program does not foster excessive government entanglement with religion?

STATEMENT OF THE CASE

This suit was brought on March 27, 1972 by the American Civil Liberties Union of Maryland, Protestants and Other Americans United for Separation of Church and State and the Appellants, four Maryland citizens and taxpayers. Plaintiffs' complaint alleged that the Maryland statute violated the Establishment Clause and the Free Exercise Clause of the First Amendment. Plaintiffs prayed that the statute be declared unconstitutional on its face and as applied; that the Appellee, Board of Public Works of Maryland (defendant below) be enjoined from paying aid to the Appellee colleges (defendants below); that the Appellee colleges be required to return the funds received with interest earned; and that judgment for costs in favor of Appellants be entered.

Defendants to the suit are the Appellees herein: The Board of Public Works of the State of Maryland and its three individual members; and five private church-related colleges.

The Maryland statute was enacted in 1971 and amended in 1972 and 1973. Chapter 626, Acts of 1971, effective July 1, 1971 authorized the Board of Public Works to award to private institutions meeting the criteria set forth, two hundred dollars for each Associate degree granted and five hundred dollars for each Bachelor's degree granted by the college. The Act provided that the college could not be an institution awarding only seminarian and theological degrees. The Act contained no restrictions as to the use of the funds granted.

The 1971 Act was amended by Chapter 534, Acts of 1972, effective July 1, 1972. The Act imposed the restriction that no funds received could be used for sectarian purposes.

The Act was further amended in 1973 by Chapter 716, Acts of 1973, effective July 1, 1973. The Act provided for awards of five hundred dollars for advanced degrees, provided that sufficient funds were appropriated in excess of sums necessary for awards for undergraduate degrees. The restrictions as to use were effective as to the graduate awards.

The court below dismissed the organizational Plaintiffs for lack of standing (A. 2, n. 1), and dismissed the challenge based upon the Free Exercise Clause (A. 3, n. 2).

On the merits the court below held that the original version of the statute, Chapter 626, Acts of 1971, violated the Establishment Clause because it contained no restrictions prohibiting the sectarian use of the funds (A. 23). The court below denied Appellants' prayer that funds distributed under the Act be returned to the State because: 1) Suit was filed nine months after enactment of the statute and five months after payments were made; 2) The Appellees spent the funds in reliance upon the constitutionality of the Act; 3) Both *Lemon* and *Tilton* were decided after expenditure of the funds; 4) The defects in the Act were corrected in 1972 and the constitutional values to be protected by the

Establishment Clause would not be furthered by a refund (A. 24-25).

The court below held that the statute, as amended, was constitutional, and the court denied Appellants' prayers for relief. The Judgment was filed October 21, 1974 (A. 57-58).

The court below found the five Appellee colleges conformed closely to the defendant colleges in *Tilton v. Richardson*, 403 U.S. 686 (1971) (A. 10-11), and that the Appellee colleges are not so pervasively sectarian that the aid would have the primary effect of advancing religion (A. 11). The specific facts found as to Appellee Saint Joseph College are set forth in the Argument at pages 13-15 herein.

The court below found that the administering body (The Maryland Council of Higher Education) had established procedures sufficient to safeguard the funds against use for sectarian purposes. The Council requires verification by the college, before and after use of the funds, that diversion of the funds for religious purposes will not and has not occurred (A. 12). The colleges' verification of usage can be audited, if necessary, to confirm that the verified use in fact occurred (A. 12).

The court below found that the usage verification did not cause excessive entanglement of government with religion (A. 17), citing the nature of the fund accounting which is used by Appellee colleges to comply with federal grants (A. 48).

The court found that the administering body should exclude aid for the theology and religion departments of the Appellee colleges to avoid the possibility of misuse of the aid (A. 12-13). The court found "no indication that religious indoctrination was a goal of these schools" (A. 13), but that the funds should be so restricted absent "a clear indication that theology was taught as an academic discipline" (A. 13).

At the time of trial, no funds had been disbursed under the 1972 amendment which prohibited use of funds for sectarian purposes. The funds were held in escrow (A. 37, n. 2). Following the entry of judgment, Appellants moved for an injunction against payment of the escrowed funds pending this appeal. The motion was denied by the three-judge court below. Thereafter, application for injunction pending appeal was submitted to this court and denied on November 25, 1974.

ARGUMENT

I.

THIS COURT HAS ESTABLISHED CONSTITUTIONAL PRINCIPLES AND SPECIFIC CRITERIA TO DETERMINE WHETHER PUBLIC AID TO CHURCH-RELATED COLLEGES VIOLATES THE ESTABLISHMENT CLAUSE, AND THE MARYLAND DISTRICT COURT OF THREE JUDGES HAS CORRECTLY APPLIED THOSE PRINCIPLES AND CRITERIA; THEREFORE, THIS COURT SHOULD AFFIRM THE JUDGMENT BELOW ON THE GROUND THAT NO SUBSTANTIAL QUESTION IS PRESENTED WHICH REQUIRES FURTHER ARGUMENT.

This Court has established controlling constitutional principles and specific criteria to determine whether programs providing public funds to church-related institutions violate the Establishment Clause.

> "Indeed, the controlling constitutional standards have become firmly rooted and the broad contours of our inquiry are now well defined. Our task, therefore, is to assess New York's several forms of aid in the light of principles already delineated." *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 761 (1973).

The principles and criteria have been established in six decisions since 1971. *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Levitt v. Committee for Public Education & Religious Liberty*, 413 U.S. 472 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

A. The Constitutional Principles and Specific Criteria Governing this Case are Established and not in Dispute.

In each case, this Court has applied the same three-pronged test:

> "As we reaffirm today in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, the principles which govern our consideraiton of challenges to statutes as violative of the Establishment Clause are three.
>
> 'First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . ; finally, the statute must not foster "an excessive entanglement with religion." ' *Lemon v. Kurtzman, supra*, 403 U.S. 612-613." *Hunt v. McNair, supra*, 413 U.S. 734, 741.

The court below specifically applied this test to the Maryland statute. Appellants do not question the conclusion of the court below that "the statute was enacted with a secular purpose" (A. 9). Appellants do question the holdings of the court below "that the statute has not had the primary effect of advancing or inhibiting religion" (A. 9); and that the "relationship between church and state which results from this aid program is not entangling" (A. 17).

B. The Three-Judge Court Below Correctly Determined from the Facts that the Maryland Statute and the Appellee Colleges Meet the Established Criteria.

This Court has established that a pivotal issue of fact in applying the "primary effect" and "entanglement" standards, is whether the recipient institution is pervasively sectarian.

> "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institu-

tion in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." *Hunt v. McNair, supra,* 413 U.S. 734, 743.

"The Court's opinion in *Lemon* and the plurality opinion in *Tilton* are grounded on the proposition that the degree of entanglement arising from inspection of facilities as to use varies in large measure with the extent to which religion permeates the institution." *Hunt v. McNair, supra,* 413 U.S. 734, 746.

"Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education. This reduces the risk that government aid will in fact serve to support religious activities. Correspondingly, the necessity for intensive government surveiilance is diminished and the resulting entanglements between government and religion lessened." *Tilton v. Richardson,* 403 U.S. 672, 687.

In *Tilton* and *Hunt,* this Court found that the facts supported its observation that "college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines." *Tilton v. Richardson, supra,* 403 U.S. 672, 686.

> "On the record in this case, there is no basis to conclude that the College's operations are oriented significantly towards secetarian rather than secular education." *Hunt v. McNair, supra,* 413 U.S. 734, 744.
>
> "In short, the evidence shows institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education." *Tilton v. Richardson, supra,* 403 U.S. 672, 687.

The court below found that the Appellee colleges "conform closely to the colleges approved in *Tilton v. Richardson*"

(A. 10-11). Appellants continue to maintain, in their jurisdictional statement (p. 22) that four of the Appellee colleges are "sectarian."

A second pivotal issue of fact established by this Court in applying the "primary effect" and "entanglement" standards is whether the character of the aid provided is "secular" and "nonideological." *Tilton v. Richardson, supra,* 413 U.S. 672, 679; *Committee for Public Education and Religious Liberty v. Nyquist, supra,* 413 U.S. 756, 780.

In *Tilton, supra,* this Court considered Title I of the Higher Education Facilities Act of 1963. 77 Stat. 364, as amended, 20 U.S.C. §§ 711-721 (1964 ed. and Supp. V), which "provides construction grants for buildings and facilities used exclusively for secular educational purposes." 403 U.S. 672, 674-75. This Court cited the restrictions set forth at § 751 (a) (2) of the statute which expressly excluded:

> "Any facility used or to be used for sectarian instruction or as a place for religious worship, or * * * any facility which * * * is used or to be used primary in connection with any part of the program of a school or department of divinity * * *." *Tilton v. Richardson, supra,* 403 U.S 672, 675.

In *Hunt v. McNair, supra,* this Court considered a South Carolina statute with the following restrictions:

> "Any facility used or to be used for secetarian instruction or as a place of religious worship nor any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity for any religious denomination." *Hunt v. McNair,* 413 U.S. 734, 736-37.

The Maryland statute has the following restricting language:

> "None of the monies payable under this subtitle shall be utilized by the institution for sectarian purposes." Maryland Annotated Code, Article 77A, § 68A (A. 54).

"In order to qualify for state aid apportionments pursuant to this subtitle, any institution of higher education must meet each of the following requirements: . . . (d). The institution cannot be one awarding only seminarian or theological degrees; . . ." Maryland Annotated Code, Article 77A, § 66 (A. 53).

In *Tilton v. Richardson, supra,* and *Hunt v. McNair, supra,* use of the aid was forbidden for "sectarian instruction" or "religious worship" and "in connection with any part of the program of a school or department of divinity." The Maryland statute forbids use of the aid for "sectarian purposes" and declares ineligible colleges "awarding only seminarian or theological degrees." The court below construed the restrictions to forbid aid to theology departments, a restriction similar to the statutory restrictions considered in *Tilton* and *Hunt.*

C. This Court's Established Principles and Criteria Do Not Require that Aid to Church-Related Colleges Which is Restricted to Non-Sectarian Purposes Must Be Further Limited to Particular Secular Purposes.

Despite the statutory restriction, Appellants, in their Jurisdictional Statement, characterize the Maryland aid as "undefined" (p. 7), "virtually unlimited" (p. 8) and "unrestricted" (p. 17). Appellants apparently contend that there is a constitutional requirement that the aid must not only be restricted as to forbid use for sectarian purposes, but the use of the aid for non-sectarian purposes must be further restricted.

The court below considered this question and concluded:

"The Maryland aid program is characterized by direct non-categorical grants restricted by a prohibition on use for sectarian purposes. Leaving aside the question of

the efficacy of this prohibition, the differences between this program and the *Tilton* program are more apparent than real. In *Tilton* direct grants were available for the construction of virtually any type of building, subject to similar prohibitions against sectarian usage. Thus, the *Tilton* funds were used to construct two libraries, a music, drama and arts building, a science building and a language laboratory. Every non-sectarian program in the defendant colleges could be benefited by the federal aid program, and the difference between the *Tilton* aid program and the Maryland aid program thus resolves itself into a difference between construction grants and non-categorical grants. Clearly the latter distinction does not rise to constitutional dimensions" (A. 17).

It is significant that this Court in *Tilton v. Richardson, supra,* in expressly considering the twenty-year duration of the restrictions, left the use of the buildings virtually unrestricted for the entire useful life of the building, except for the restriction against religious worship and sectarian instruction.

"Limiting the prohibition for religious use of the structure to 20 years obviously opens the facility to use for any purpose at the end of that period." 403 U.S. 672, 683.

"We conclude that the Act does not violate the Religious Clauses of the First Amendment except that of § 754 (b) (2) providing a 20-year limitation on the religious use restrictions contained in § 751 (a) (2)." 403 U.S. 672, 691.

In *Hunt v. McNair, supra,* the aid was in the nature of revenue bonds for "projects", and this Court found that the religious restrictions in the statute, as set forth above, were sufficient.

"The scope of the Authority's power to assist institutions of higher education extends only to 'projects' and the Act specifically states that a project 'shall not in-

clude' any buildings or facilities used for religious purposes. . . . In addition, as we have indicated, every lease agreement must contain a clause forbidding religious use and another allowing inspection to enforce the agreement. For these reasons, we are satisfied that implementation of the proposal will not have the primary effect of advancing or inhibiting religion." *Hunt v. McNair, supra,* 413 U.S. 734, 744-45.

This Court has required that aid to church-related colleges be restricted to secular purposes. It has not required that the secular purposes be categorized or limited in any other manner. The fact that Maryland aid is "non-categorical" is a distinction without a difference.

The court below applied the constitutional principles and criteria established by this Court to determine whether public aid to church-related institutions violates the Establishment Clause. The court below has determined that none of the colleges are pervasively sectarian and that the state aid is nonideological. This Court has not required secular aid to be categorized for particular secular purposes. This case does not present a substantial question.

II.

THE MARYLAND DISTRICT COURT OF THREE JUDGES IS CORRECT IN HOLDING THAT THE MARYLAND STATUTE DOES NOT HAVE THE PRIMARY EFFECT OF ADVANCING RELIGION.

In order to sustain Appellants' contention that public aid to the Appellee colleges has the primary effect of advancing religion, Appellants must prove that "religion so permeates the secular education provided by church-related colleges and universities that their religious and secular educational functions are in fact inseparable." *Tilton v. Richardson, supra,* 403 U.S. 672, 680.

A. St. Joseph College Has as Its Primary Purpose to Provide a Secular Education and Religion Does Not Permeate that Secular Education to the Extent that the Religious and Secular Educational Functions Are Inseparable.

The conclusion of the court below, that St. Joseph College, as well as the other Appellee colleges, closely parallels the colleges in *Tilton*, is sustained by the record. The following comparison specifically illustrates the parallels.

1. St. Joseph Colege is "characterized by an atmosphere of academic freedom rather than religious indoctrination" (A. 42). See *Tilton v. Richardson, supra,* 403 U.S. 672, 681.

2. Courses at St. Joseph College are taught "according to the academic requirements intrinsic to the subject matter and the individual teacher's concept of professional standards" (A. 40). See *Tilton v. Richardson, supra,* 403 U.S. 672, 681.

3. St. Joseph College "subscribes to the 1940 Statement of Principles on Academic Freedom of the American Association of University Professors, and . . . obviously abides by it" (A. 39). See *Tilton v. Richardson, supra,* 403 U.S. 672, 681-82. The teachers are subject to "no religious pressures, by anyone, on their classroom presentation or their selection of texts and course materials" (A. 38).

4. At St. Joseph College there are no "quotas for membership on the governing board based on religion or membership in a religious order" (A. 43). The College does not "receive aid from or make reports to an institutional church" (A. 43). In *Tilton v. Richardson, supra,* the colleges were governed by "Catholic religious organizations." 403 U.S. 672, 686.

5. At St. Joseph College "the great majority of students . . . are Catholics" (A. 44), but "student bodies are

chosen without regard to religion" (A. 44). See *Tilton v. Richardson, supra*, 403 U.S. 672, 686.

6. At St. Joseph College "the main criteria for hiring is academic quality" and "hiring decisions are effectively low-level and participatory" (A. 41).

7. St. Joseph College does not "require attendance at any religious exercise" (A. 44). See *Tilton v. Richardson, supra*, 403 U.S. 672, 686.

8. Although St. Joseph College is "interested in encouraging spiritual interests," this encouragement does not "go beyond providing the opportunities or occasions for religious experience" (A. 45), and "no aspect of the student conduct code . . . has any religious content" (A. 44).

9. Although some classes at St. Joseph College begin with a prayer, "those classes which do start with prayer often do not utilize what would be called a traditional form of prayer, and students join in or not at their option" (A. 39). "[T]here is no actual college policy encouraging prayer in class. It is treated as a facet of the instructor's academic freedom" (A. 39). The Court below found that "a Maryland education department group which monitered the teachers education program at the College saw no evidence of religion entering into any elements of that program" (A. 40). This Court in *Tilton v. Richardson, supra*, found no evidence of religion "seeping" into secular programs. 403 U.S. 672, 681.

10. St. Joseph College does "not offer majors in religion or theology" (A. 45), but "certain of these courses are required" (A. 46). The court below found "no indication that religious indoctrination was a goal of [St. Joseph College]" (A. 13), but that religious courses "afford a congenial means of furthering the secondary objective of fostering religious experience" (A. 46). In *Tilton v. Richardson, supra*, this

Court found that religious courses were required and that they were taught as academic disciplines. 403 U.S. 672, 686.

Appellants rely heavily upon the finding of the court below that a secondary objective of each Appellee college is to "encourage spiritual development of the students, . . ." (A. 45). This finding was quite specific. The court found, "at none of these institutions does this encouragement go beyond providing the opportunities or occasions for religious experience" (A. 45).

In the face of these facts as found by the court below, Appellants still urge this Court to find a substantial question based on their contention that the Appellees are "sectarian." Clearly St. Joseph College is not "an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission. . . ." *Hunt v. McNair, supra*, 413 U.S. 734, 743.

Appellants further contend that "since there is a practice of prayer in at least some classrooms, the State is financing religious worship . . . . Therefore, the Maryland program is unconstitutional" (Jurisdictional Statement, pp. 19-20). This contention is not supported by precedent. The coercive elements cited by this Court in *School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203, 223 (1963), are not present in this case.

In the instant case, there is no contention that the State requires prayer; the Appellee institutions do not require prayers; the prayers are not part of the curriculum; the students are not required by law to attend; the teachers are not required to supervise the prayer or to say the prayer. There is no precedent of this Court holding that governmental aid to a private institution violates the Establishment Clause because the institution permits prayers to be said by those associated with it.

B. At St. Joseph College There Are No Religious Restrictions on Faculty Appointments and Student Admissions.

Appellants contend that Appellee colleges "impose religious restrictions on faculty appointments and perpetuate de facto religious restrictions on student admissions" (Jurisdictional Statement, p. 20). There is absolutely no evidentiary basis to support either of these contentions with respect to St. Joseph College; the express testimony and exhibits were precisely to the contrary, and the Court below so found:

> "However, thorough analysis of the student admission and recruiting criteria of each defendant demonstrates that the student bodies are chosen without regard to religion" (A. 44).
>
> "At . . . St. Joseph College, members of religious orders of women receive less than full faculty salary, although budgetary considerations lead the colleges to favor a member of an order, the main criteria for hiring is academic quality" (A. 41).
>
> ". . . the faculty members of each defendant, many of whom testified, impress the Court as professionals who value academic freedom and see no place for religious bias in liberal arts education" (A. 41).

The contention of Appellants that there are restrictions on faculty hiring and student admissions is without foundation in the evidence and the findings of the court below.

C. The Maryland Statute Prohibits Aid for Sectarian Purposes and the State has Established Procedures to Enforce the Restrictions.

Appellants maintain "there is no effort whatsoever to ascertain that the Maryland aid, when ultimately received by the church-related appellees, is confined to secular purposes. . . ." (Jurisdictional Statement, p. 17). The court below

described the administrative mechanisms which Appellants maintain do not exist:

> "The second level of screening is a determination of whether state funds have been improperly used. After the program was in operation and one year's funds awarded, the statute was amended to prohibit the use of state funds for 'sectarian purposes.' Chap. 534, 1972 Laws of Maryland, Art. 77A, § 68A, Annotated Code of Maryland (1969 Replacement Vol.). That statutory stricture is implemented through requirements of verification by the college president before receipt that funds will not be improperly expended, and verification one year thereafter that funds have not been improperly used. The Council requires sufficient detail, through follow-up on the usage description which accompanies the second verification, to determine whether the expenditure was for sectarian use. (The pre-amendment funds awarded for degrees conferred during the 1970-1971 academic year were never subjected to this second level of screening.)
>
> The usage verification and the normal annual accounting which each college conducts obviate the need for post-audit analysis in every case. Such analysis is available when needed, however. State auditors could accomplish a post-audit analysis, using accepted accounting techniques, in one day or less" (A. 47-48).

Appellants contend: "Nor [at the time of trial] had the State made any effort to ascertain how funds already paid to the church-related appellees had been used." (Jurisdictional Statement, pp. 5-6). They overlook the fact that the only funds paid out at the time of trial were paid under the original act which did not contain any restrictions on sectarian use, and the funds awarded after the Act was amended in 1972 were still in escrow (A. 37, n. 2).

Appellants contend that the State's enforcement will be ineffective, citing the finding of the court below that the

available audit procedure is "non-judgmental." (Jurisdictional Statement, p. 18.) It is clear, however, that it is not the availability of the audit procedure which is the primary mechanism of enforcement. The audit procedure is just an additional mechanism which is "available when needed" as a "mechanical accounting of state grant expenditures." (A. 48).

The restrictions are enforced by requiring the college presidents to verify, before and after receipt and use of the funds that they will not be improperly used, and with "sufficient detail, through follow-up on the usage description . . . to determine whether the expenditure was for sectarian use" (A. 48).

Despite the conjecture and hypothetical problems raised by Appellants, the court below was satisfied that the State's procedures, and the experience of the Appellee institutions with federal program requirements, afford protection that the aid will be used for secular purposes (A. 48).

After extensive testimony, the court below concluded that the State was able and prepared to enforce the restriction:

> "The procedural posture of this case has prevented the development of follow-up procedures to ensure that no state funds are converted to religious uses in later years. However, unlike the 20-year restriction held unconstitutional in *Tilton*, the prohibition on sectarian use in the statute is absolute, and the Council seems aware of its responsibilities in this matter. The Court is satisfied that adequate, non-entangling follow-up procedures will be developed. *See* Findings of Fact" (A. 18).

Because religion does not permeate the secular educational programs of Appellee colleges, the established procedures of the Maryland administering body effectively prohibit the use of funds for sectarian purposes as required by the Maryland Act. The Maryland District Court of three judges is correct

in holding that the statute does not have the primary effect of advancing religion, and therefore, this case does not present a substantial question.

III.

THE MARYLAND DISTRICT COURT OF THREE JUDGES IS CORRECT IN HOLDING THAT THE MARYLAND AID PROGRAM DOES NOT FOSTER EXCESSIVE GOVERNMENTAL ENTANGLEMENT WITH RELIGION.

The court below found that the "relationship between church and state which results from this aid program is not entangling" (A. 17). The court below considered the three mitigating factors noted by this Court in *Tilton:*

> "In evaluating administrative entanglement, the Court must examine three factors: The 'character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority'. *Lemon v. Kurtzman, supra,* at 615" (A. 14).

The court below concluded that 1) "The aid in this program is restricted to the secular aspects of the institutions." (A. 19); 2) "It has been found that religious indoctrination is not a purpose of these institutions." (A. 19); 3) "the continuing nature of the program is not constitutionally fatal" (A. 20).

A. This Court has Established that the Risk of Entanglement Between Government and Religion is Lessened When Religion Does Not Permeate the Area of Secular Education of Church-Related Colleges.

The factual basis for this Court's holding in *Lemon v. Kurtzman, supra,* that the Pennsylvania aid program fostered excessive entanglement between government and religion,

was the finding that religion and indoctrination were interwoven through the fabric of the entire educational program:

> "The curriculum presents subtle and difficult problems. The constitutional mandate can in part be carried out by censoring the curricula. What is palpably a sectarian course can be marked for deletion. But the problem only starts there. Sectarian instruction, which, of course, a State may not indulge, can take place in a course on Shakespeare or in one on mathematics. No matter what the curriculum offers, the question is, what is *taught*? We deal not with evil teachers but with zealous ones who may use any opportunity to indoctrinate a class." *Lemon v. Kurtzman, supra*, 403 U.S. 602, 634-35 (concurring opinion of Mr. Justice Douglas).
>
> "It is well known that everything taught in most parochial schools is taught with the ultimate goal of religious education in mind." *Lemon v. Kurtzman, supra*, 403 U.S. 602, 635 (concurring opinion of Mr. Justice Douglas).
>
> "In the present cases we deal with the totality of instruction destined to be sectarian, at least in part, if the religious character of the school is to be maintained. A school which operates to commingle religion with other instruction plainly cannot completely secularize its instruction. Parochial schools, in large measure, do not accept the assumption that secular subjects should be unrelated to religious teaching." *Lemon v. Kurtzman, supra*, 403 U.S. 602, 636-37 (concurring opinion of Mr. Justice Douglas).

In *Lemon*, this Court found that policing the restrictions upon the aid would require an entangling relationship:

> "I would think that policing these grants to detect sectarian instruction would be insufferable to religious partisans and would breed division and dissension between church and state." *Lemon v. Kurtzman, supra*, 403 U.S. 602, 636 (concurring opinion of Mr. Justice Douglas).

This Court in *Lemon* also found direct and absolute control of the church over the teachers: "This problem looms large where the church controls the hiring and firing of teachers." *Lemon v. Kurtzman, supra*, 403 U.S. 602, 636 (concurring opinion of Mr. Justice Douglas).

It is clear that the basic distinction between *Tilton* and *Lemon* is that the secular educational function of the colleges in *Tilton* was not so permeated by religious indoctrination that an entangling relationship resulted from enforcement of the restrictions:

> "Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education. This reduces the risk that government aid will in fact serve to support religious activities. Correspondingly, the necessity for intensive government surveillance is diminished and the resulting entanglement between government and religion lessened. Such inspection as may be necessary to ascertain that the facilities are devoted to secular education is minimal and indeed hardly more than the inspections that States impose over all private schools within the reach of compulsory education laws." *Tilton v. Richardson, supra*, 403 U.S. 672, 687.

Again in *Hunt v. McNair, supra*, this Court stated that the entanglement of government and religion was caused by the inseparability of religion and the secular educational program:

> "The Court's opinion in *Lemon* and the plurality opinion in *Tilton* are grounded on the proposition that the degree of entanglement arising from inspection of facilities as to use varies in large measure with the extent to which religion permeates the institution." 413 U.S. 734, 746.

B. The Court Below Found that Religion Did Not Permeate the Secular Educational Programs of the Appellee Institutions, and the State Could Ensure Use of the Aid for Those Secular Programs Without Establishing an Entangling Relationship.

In administration, the Maryland aid program initially eliminates from eligibility colleges which primarily award theological degrees (A. 18). As to the eligible colleges, the president must verify before and after receipt of the funds that they will be used for purposes permitted by the statute (A. 48). The State administering body "requires sufficient detail, through follow-up on the usage description which accompanied the second verification, to determine whether the expenditure was for sectarian use" (A. 48).

This two-step "before and after" verification procedure is essentially the type of procedure used to ensure proper use of funds received under the Higher Education Facilities Act of 1963. (See the lower court decision in *Tilton*, i.e. *Tilton v. Finch*, 312 F. Supp. 1191, at 1202 (D. Conn. 1970).

Once the use made of the aid is identified by the college and approved by the administering body, an auditing procedure is available to verify that the funds are used for the purposes stated. The court below found that the technique of fund accounting to comply with grant restrictions is in use at the colleges to comply with federal grant programs and that any aduit required by the Maryland program would be "quick and non-judgmental" (A. 48).

Appellants contend that a non-judgmental audit is of no effect. Obviously, the auditor "judges" whether the funds are spent for the purposes stated. The effective judgment is made, however, by the administering body in acting upon the usage verification. Since religion does not permeate the

secular education of the Appellee colleges, the judgments made do not require the sorting out of religious from secular functions which this Court has held to be entangling.

Appellants object that the Maryland aid could be used by the colleges to pay teachers' salaries, and that "teachers are not necessarily religiously neutral." *Tilton v. Richardson*, *supra*, 403 U.S. 672, 687-88. Aid for such purposes would not be a subsidy to teachers, but would be aid to the secular educational program of the college, which the court below has found to be implemented out without any religious indoctrination or inculcation of religious values by the teachers (A. 14). Unlike the parochial schools in *Lemon*, the teachers at Appellee colleges are not hired directly by the church, and they teach in accordance with academic, not religious, requirements (A. 40-42).

It is clear that this Court in *Tilton* permitted a "continuing relationship" between the government and colleges. The Court, in fact, required the inspection of the facility to continue beyond the twenty-year period prescribed by the statute. 403 U.S. at 689. This Court distinguished *Tilton* from *Lemon* because enforcement of the Higher Education Facilities Act did not require a continuous surveillance of the institution:

> "Finally, government entanglements with religion are reduced by the circumstance that, unlike the direct and continuing payments under the Pennsylvania program, and all the incidents of regulation and surveillance, the Government aid here is one-time, single-purpose construction grant." *Tilton v. Richardson*, *supra*, 403 U.S. 672, 688.

A continuing relationship between the State of Maryland and Appellee colleges does not, in itself, foster excessive entanglement between government and religion. The entangling

relationship found by this Court in *Lemon* was the continuing governmental surveillance necessary to detect and remove from parish school programs the methods of religious inculcation which permeated those sectarian institutions. In this case, the court below found that no such detection and removal is necessary, because the secular educational programs of the colleges are not permeated by religion, and that the State can ensure use of the aid for those secular programs without establishing an entangling relationship. The Maryland District Court of three judges correctly held that the Maryland aid program does not foster excessive governmental entanglement with religion, and therefore this case does not present a substantial question.

CONCLUSION

The court below correctly applied the constitutional principles and specific criteria established by this Court and determined that the Maryland aid program does not have the primary effect of advancing religion and does not foster excessive entanglement between government and religion. Although Appellants insist that the court below erred in its factual findings that the secular educational programs of Appellee institutions are not permeated by religion, and that the Maryland statute does, in fact, restrict the aid from use for sectarian purposes, such insistence by Appellants does not raise a substantial question warranting further argument before this Court, and the judgment of the Maryland District Court of three judges should be affirmed.

Respectfully submitted,

GEORGE T. TYLER,
1600 Maryland Nat'l Bk. Bldg.,
Baltimore, Maryland 21202,
Counsel for Appellee.

January 10, 1975

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-730

JOHN C. ROEMER, III, EDWARD E. DOERR, KENNETH A. STEVENS, AND CYNTHIA KOONCE MILLER,

Appellants,

v.

BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND; MARVIN MANDEL, GOVERNOR; LOUIS L. GOLDSTEIN, COMPTROLLER; J. MILLARD TAWES, TREASURER; WESTERN MARYLAND COLLEGE; COLLEGE OF NOTRE DAME; MOUNT SAINT MARY'S COLLEGE; SAINT JOSEPH COLLEGE; AND THE ASSOCIATED PROFESSORS OF LOYOLA COLLEGE OF THE CITY OF BALTIMORE, INC.,

Appellees.

ON APPEAL FROM A UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

MOTION TO AFFIRM OF STATE APPELLEES

FRANCIS B. BURCH,
Attorney General of Maryland,
HENRY R. LORD,
Deputy Attorney General
of Maryland,
GEORGE A. NILSON,
Assistant Attorney General
of Maryland,
For State Appellees.

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ON APPEAL FROM A UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

MOTION TO AFFIRM OF STATE APPELLEES

Appellees, Board of Public Works of the State of Maryland and the Governor, Comptroller and Treasurer of Maryland, being the three individual members thereof, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the judgment of the three-judge District Court be affirmed on the ground that the questions presented are so unsubstantial as not to warrant further argument.

OPINIONS BELOW

The majority and dissenting opinions of the three-judge District Court have not yet been reported and are reprinted at pages A-1 to A-25 and A-26 to A-34, respectively, in the Appendix to the Jurisdictional Statement. The Court's findings of fact, incorporated into the majority opinion, are reprinted at pages A-35 to A-51 of the Appendix.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Jurisdictional Statement.

QUESTIONS PRESENTED

1. Whether the lower court was correct in holding that Maryland's program of aid to higher education does not have the primary effect of advancing religion?

2. Whether the lower court was correct in holding that the relationship between church and state which results from Maryland's aid program is not entangling?

3. Whether plenary review of the decision below is warranted when the lower court, after extensive factual inquiry, scrupulously applied the applicable First Amendment principles frequently and recently enunciated in various decisions of this Court in upholding the Maryland aid program?

4. Whether this Court, in the event it now finds constitutional fault with the Maryland program, should order the appellee institutions to refund monies received by them in good faith prior and subsequent to the lower court's favorable decision?

STATUTES INVOLVED

The statutes involved are Maryland Annotated Code, Article 77A, §§ 65-69, as amended (the "Act"), reprinted

beginning at page A-52 of the Appendix to the Jurisdictional Statement.[1]

STATEMENT OF THE CASE

The Maryland Act sustained by the lower court provides for the payment of public funds to non-profit private colleges and universities in the State which meet the eligibility criteria set forth in Section 66 of Article 77A of the Maryland Annotated Code (A-52, A-53).[2] No aid to primary or secondary schools is involved here. Funds are paid in the form of annual non-categorical grant awards to each eligible institution. In order to be eligible to receive any award, an institution must maintain one or more earned degree programs, culminating in an associate of arts or bacculaureate degree. Institutions awarding only seminarian or theological degrees are not eligible to participate and several have been disqualified (A-47). The amounts of the annual awards to eligible institutions are based on full-time students enrolled during the preceding fiscal year and any full-time students enrolled in seminarian or theological academic programs must be excluded from the computation.[3] Article 77A, Section 67 (A-54, A-55).

While the Act does not limit the use of the funds to any particular type of expenditure (such as library construction, text books, transportation, or the like), Section 68A specific-

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[1] The portion of Chapter 716 of the Laws of Maryland of 1973 reprinted at page A-56 of the Appendix represents the version of Section 67 in effect from July 1, 1973 to July 1, 1974. Section 4 of Chapter 585 of the Laws of Maryland of 1974 sets forth a one-time award computation formula for fiscal year 1975. That one-time formula is neither reprinted in the Appendix to the Jurisdictional Statement nor set forth in an Appendix to this Motion to Affirm and is not material to the questions presented herein.

[2] "A" refers to the Appendix to the Jurisdictional Statement.

[3] Under earlier versions of the law, computations were based on degrees awarded, exclusive of any seminarian or theological degrees.

ally provides that "None of the monies payable under this subtitle shall be utilized by the institutions for sectarian purposes".[4] The State Board of Public Works and the Maryland Council for Higher Education are required to adopt criteria and procedures for its administration, including requirements for the submission of reports or data concerning the utilization of monies paid to the institutions. Article 77A, Section 68 (A-54). Pursuant to this statutory directive, the presidents of the institutions are first required to certify under oath[5] prior to receipt of any funds that such funds will not be expended for sectarian purposes and are then required to file a similar certificate a year later that the funds received have not been actually expended for sectarian purposes (A-48). The lower court found that:

> "The usage verification and the normal annual accounting which each college conducts obviate the need for post-audit analysis in every case. Such analysis is available when needed, however. State auditors could accomplish a post-audit analysis, using accepted accounting techniques, in one day or less. This mechanical accounting of State expenditures is not entangling . . . [and] is quick and non-judgmental" (A-48).

There is no time limit on the statutory prohibition of sectarian usage of funds and the lower court found "that the administering body clearly understands that sectarian usage is forbidden, no matter when it occurs" (A-49).

Section 69 of Article 77A contains severability provisions to the effect that if any portion of the Act or any particular

[4] This specific prohibition was added one year after the statute was first enacted and prior to the initiation of this case.

[5] Section 435 of Article 27 of the Maryland Annotated Code defines the offense of perjury as including "an oath or affirmation, if made willfully and falsely in any of the following cases . . .: . . . in all affidavits required by law to be taken; . . . all affidavits required to be made to reports and returns made to . . . any officer of the government . . .".

payments made thereunder are held to be unconstitutional or invalid for any reason, then neither the remaining portions of the Act, nor any other payments made thereunder, shall be deemed affected by such unconstitutionality or invalidity (A-54, A-55).

After an extensive factual inquiry into the operation and nature of the five appellee educational institutions, the lower court found that none are pervasively sectarian but that all are church-related and conform closely to the colleges approved in *Tilton v. Richardson*, 403 U.S. 672 (1971).[5a] The Maryland institutions were contrasted with the more strongly sectarian South Carolina college receiving aid under the statute upheld in *Hunt v. McNair*, 413 U.S. 734 (1973) (A-10, A-11).

The correctness of these "ultimate" conclusions and the care with which the lower court followed the analytical teachings of this Court as set forth in *Tilton* and *Hunt* are best evidenced by consideration of the following findings of fact, all of which are fully supported by the record:

> ". . . An aid program need not have the primary effect of advancing religion unless recipient institutions are so permeated by religion that the secular side cannot be separated from the sectarian. The defendants here are not in that pervasively sectarian category" (A-38).
>
> "Not only has there been no showing that religion slants the conduct of classes at the defendant institutions, this litigation has demonstrated the opposite to be true" (A-38).
>
> * * * * * *
>
> ". . . there is no actual college policy encouraging prayer in class. It is treated as a facet of the instructor's academic freedom. Moreover, plaintiffs failed to establish that beginning a class with prayer in any way diminishes the atmosphere of intellectual freedom which marks

[5a] By referring to and treating the colleges as a group, we do not mean to disagree with the position of Western Maryland College that it is not church-related.

these colleges . . . . It appears that prayer in class is as peripheral to the subject of religious permeation of an institution as are the facts that some instructors wear clerical garb, and some classrooms have religious symbols. None of these facts impairs the clear and convincing evidence that courses at each defendant are taught 'according to the academic requirements intrinsic to the subject matter and the individual teacher's concept of professional standards.' *Tilton v. Richardson, supra,* 403 U.S. 681" (A-39, A-40).

* * * * * *

"Despite this variety of hiring situations, two things are common to each defendant. Hiring decisions are effectively low-level and participatory. And at no defendant was there such dominance on the faculty by one religious group that hiring bias would escape the attention of members of other religious groups. Even more importantly, the faculty members of each defendant, many of whom testified, impress the Court as professionals who value academic freedom and see no place for religious bias in liberal arts education . . ." (A-41).

"Though the above represents a finding as to faculty hiring generally, the hiring patterns for religion or theology departments are a special case and present a unique problem . . ." (A-41, A-42).

"**. . . although the Court finds that the extent of academic freedom at each defendant belies a finding that any of them are 'pervasively sectarian,' *Hunt v. McNair,* 41 USLW 5174, 5177 (June 25, 1973), the Court is unable to characterize the manner in which theology and religion courses are conducted. Those courses notwithstanding, the extent of academic freedom at each institution, coupled with the more intangible factors that determine an institution's 'atmosphere,' discussed below, lead to a conclusion that each defendant is 'characterized by an atmosphere of academic freedom rather than religious indoctrination,' *Tilton v. Richardson, supra,* 403 U.S. 681, and therefore that the primary effect of aid to these defendants is not to advance 'religion'"** (A-42, A-43).

"**. . . The record and testimony in this case amply support a finding that at none of the defendants is religious indoctrination a substantial purpose or activity . . .**" (A-43).

* * * * * *

"**. . . Representatives of each defendant candidly admitted that their institution is interested in encouraging spiritual interest . . . . [but] at none of these institutions does this encouragement go beyond providing the opportunities or occasions for religious experience**" (A-45).

* * * * * *

"**The Court has already stated its view that it is neither legally empowered nor genuinely able to characterize the manner in which theology and religion are studied at these schools . . .[6] However, the Court's findings as to the chaplaincy program and the religion or theology courses do not impair the general finding that religious indoctrination is not a substantial purpose or activity of any of these defendants**" (A-46).

In the first three years of the aid program's operation, the five appellee institutions have comprised slightly less than one-third of the eligible institutions receiving awards and have together received approximately that same fraction of the total funds awarded (A-37, n. 2). One of these five institutions, Saint Joseph College, has since ceased operation and will not receive further funds and another, Western Maryland College, vigorously urges that it is not properly characterized as church-related. Circuit Court Judge Bryan, in his dissent below, agreed with Western Maryland's contention (A-26, n. 2). No claim is made that other Maryland

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[6] Because of the possibility (rather than the fact or certainty) that religion and theology courses at the schools could be devoted to deepening religious experiences in a particular faith and in light of the perceived difficulty of either the court or the State making the necessary determination, the Court held that the State must take steps to "ensure that public funds are not used to support such [course] programs" (A-13). These steps are within the power of the administering agencies and are already being taken in connection with the payments made subsequent to the lower court's decision.

institutions receiving funds are either church-related or pervasively sectarian. In commenting on this balance between church-related and other institutions, the lower court noted that Maryland's program "does not primarily aid one particular religious group with a large educational establishment" (A-22).

Except for the first year's awards, which had been paid prior to the adoption of the explicit statutory prohibition against the use of funds for sectarian purposes and prior to the commencement of these proceedings, the awards made for the benefit of the appellee institutions based upon their undergraduate programs were held in escrow by the State of Maryland pending the decision of the lower court. Payments to two of the institutions based upon graduate level degrees were made in early 1974 in accordance with a 1973 amendment of the Act (A-56).[7] These graduate degree payments, as well as the more recent payments of the escrowed undergraduate awards, were made after the Appellants' requests for specific injunctive relief had been denied.

ARGUMENT

In upholding Maryland's aid program as applicable to church-related colleges, the lower court carefully adhered to the three part test established by this Court and found that the program has a secular legislative purpose, does not have the primary effect of advancing or inhibiting religion and does not foster an excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). Appellants concede the presence of a secular legislative purpose but argue that Maryland's statutory program contains at least the potential for having the primary effect of advancing religion and fostering excessive entanglement. Unless

[7] These institutions certified to the lower court that the monies would be used only for the graduate level programs (R. 1399, 1400).

this Court wishes to fully review every application by a lower court of its established criteria, and to do so in the context of potential rather than actual First Amendment problems in the field of higher education, then plenary review should not be granted here and the decision below should be summarily affirmed.

I.

THE MARYLAND ACT DOES NOT HAVE THE PRIMARY EFFECT OF ADVANCING RELIGION.

In order to demonstrate that Maryland's aid program has the prohibited primary religious effect, Appellants must sustain their burden of proving either:

> (1) that aid monies flow to "an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission". (*Hunt v. McNair*, 413 U.S. 734, 743 (1973)); or
>
> (2) that monies awarded under the program are funding "specifically religious activity in an otherwise substantially secular setting." *Ibid.*

A. *Institutions of Higher Education Must Be Viewed Differently Than Primary and Secondary Schools.*

This Court established in *Tilton v. Richardson*, 403 U.S. 672, 685 (1971) and reaffirmed in *Hunt v. McNair*, 413 U.S. 734 (1973) and *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 777 n. 32 (1973), the proposition that

> ". . . there are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools"

and that these differences must be given prominent consideration in determining the constitutionality of any program of aid to higher education. These critical differences were

initially detailed in Chief Justice Burger's plurality opinion in *Tilton v. Richardson* as follows:

> "The 'affirmative if not dominant policy' of the instruction in pre-college church schools is 'to assure future adherents to a particular faith by having control of their total education at an early age.' . . . There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination . . . The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the congressional objectives and limitations. Furthermore, by their very nature, college and post-graduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines. Finally, many church-related colleges and universities seek to evoke free and critical responses from their students and are characterized by a high degree of academic freedom." 403 U.S. at 685-86.

Having found the four Catholic colleges involved in the *Tilton* case to be "institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education" (403 U.S. at 686-87), the Court concluded that:

> "Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education. This reduces the risk that government aid will in fact serve to support religious activities. Correspondingly, the necessity for intensive government surveillance is diminished and the resulting entanglements between government and religion lessened." 403 U.S. at 687.

B. *The Appellee Institutions Are Not Pervasively Sectarian.*

With regard to the first part of the primary effect test, the lower court compared the appellee institutions with the

colleges considered by this Court in *Tilton v. Richardson* and *Hunt v. McNair*, and found that none of them were "pervasively sectarian". The subsidiary findings of fact underlying this conclusion are amply supported by the trial record and demonstrate that the court below properly considered and applied the relevant criteria as established by this Court's recent decisions. It is equally apparent that those subsidiary findings of fact fully support the court's conclusion that none of the institutions are pervasively sectarian. The correctness of the lower court's holding in this regard is so clear as not to warrant further discussion.

C. *State Monies Are Not Used To Fund Specifically Religious Activities.*

The second part of the primary effect test comes into play in dealing with institutions which, while they are not pervasively sectarian, are church-related. Under this test it is necessary for the Appellants to show that the lower court erroneously held that State monies are not funding specifically religious activity in an otherwise secular setting.

There are two ways in which the burden of proving such a primary effect can be met. The first of these ways — showing that State funds in fact have been used to directly support specifically religious activity — is simply not available to Appellants here. The only State funds which were ever disbursed to and used by the appellee institutions were the 1971 awards paid prior to the adoption of the explicit statutory prohibition against the use of funds for sectarian purposes. Thus, even if the record below contained clear evidence of a specific prohibited use of *those* funds, that would have no bearing on the constitutionality of the *present* aid program. The finding of the lower court that three of the institutions commingled that first year's grant with general college operating funds (A-50) can hardly be used to strike

down the present statute, particularly in light of the fact that one of those institutions is now out of existence, the other is at best barely church-related and the third is clearly not pervasively sectarian.

The second way in which the funding of specifically religious activity can be shown is to demonstrate the absence of safeguards against such a funding. This requires far more than the speculation engaged in by the Appellants. The lower court, in declining to engage in this kind of speculation, referred to this Court's observation in *Tilton v. Richardson*, 403 U.S. at 679 (1971) that:

> "A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement . . . But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional."

This judicial admonition against such speculation is, of course, entirely consistent with the holding in the *Tilton* case that the possibility of religious use of a governmentally financed structure after the expiration of the 20 year prohibition against such use was constitutionally unacceptable. While the actual religious use of such a building was indeed only a possibility, it was a certainty that the use restriction would cease to exist altogether in 20 years. Thus, it was the *combination* of the possibility of religious use with the certainty of the absence of any prohibition which was fatal to the durational limitation.

The prohibition in the Maryland Act against sectarian use of funds is permanent and without limit. The lower court found the administering body to be clearly aware of the fact that "sectarian use is forbidden, no matter when it occurs" (A-49). There is no substantive or constitutional distinction between Maryland's statutory prohibition and the similar

prohibitions involved in *Hunt* and *Tilton* (absent the 20 year limitation), and no reason why the one should be less effective than the others.

The holding below that there are sufficient safeguards in the Maryland aid program to insure that funds are not diverted to support religious activity was not grounded solely in the statutory prohibition. The court also pointed to the prohibition against support of seminarian or theological degree programs, to the two verifications of non-sectarian usage required each year of the presidents of the institutions and to the administrative authority to perform any necessary public audits (A-12). In addition, the court cited in its findings of fact the general knowledge of the programs and operation of all colleges and universities which the Maryland Council for Higher Education acquires as a result of its other duties, the Council's requirement of additional follow-up data, where necessary, in conjunction with the post-expenditure verification and the ability of the Council to adopt additional follow-up procedures pursuant to the statutory mandate to insure that any facilities aided by State grants are not later converted to sectarian usage.

To conclude that these safeguards are inadequate would require assumptions that the college presidents will either fail to understand what is meant by sectarian usage of funds or will periodically give false oaths,[8] that follow-up data will not be requested when necessary, that post-audit analysis and accounting review will not be conducted when warranted, and that the responsible State agencies will be generally lax in their enforcement of the prohibition. The lower court quite properly declined to engage in this sort of speculation, finding no basis in the record for doing so.

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[8] This Court said in *Board of Education v. Allen*, 392 U.S. 236, 245 (1964), "we cannot assume that school authorities . . . are unable to distinguish between secular and religious books or that they will not honestly discharge their duties under the law."

The only qualification to the court's holding of an absence of a prohibited primary effect related to the teaching of the specific subjects of theology and religion at the appellee institutions. While the court did not find that the institutions' general atmosphere of academic freedom was not present in connection with the teaching of these particular courses, it was unable to find "*a clear indication* that theology was taught as an academic discipline" at these institutions (A-13, emphasis supplied). Accordingly, the State was directed to take steps to avoid the use of public funds to support such theology and religion programs (A-13). This judicial prohibition against the use of funds in such programs, under circumstances falling short of a finding of a lack of academic freedom in the area, reflects the extreme care exercised by the court in applying the applicable First Amendment principles. As indicated above, the State has already taken steps at the administrative level to comply with the lower court's order. The administering agency likewise possesses the authority and the awareness of its responsibilities to take any other similar action should actual experience under the Act indicate this to be necessary in order to effectuate the prohibition against sectarian usage. Indeed, the statute *requires* that it do so.

II.

THE MARYLAND ACT DOES NOT FOSTER AN EXCESSIVE GOVERNMENT ENTANGLEMENT WITH RELIGION.

This Court has previously isolated three factors which enter into the analysis of whether excessive entanglement is present in a government aid program. They are "the character and purposes of the institutions that are aided, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority". *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971). A careful analysis of the *Lemon* decision and others involving primary

and secondary schools, together with consideration of this Court's decisions in the higher education cases (*Tilton v. Richardson, supra* and *Hunt v. McNair, supra*), makes it clear that the first of these factors — the character and purposes of the schools — is the decisive element in the entanglement analysis. As this Court observed in *Hunt v. McNair:*

> "The Court's opinion in *Lemon* and the plurality opinion in *Tilton* are grounded on the proposition that the degree of entanglement . . . varies in large measure with the extent to which religion permeates the institution." 413 U.S. at 746.

This lesson was not lost on the lower court here, which discussed the importance of the institutions' character and the relationship between that factor and the nature of the aid involved in the following terms:

> "What emerges from a consideration of these cases is the conviction that the ideological neutrality of a particular program of aid is dependent on the type of institution being benefited. The classroom buildings provided in *Tilton* and *Hunt* are no more neutral in the abstract than the class room buildings which were maintained with public funds in *Nyquist*. The classes taught in the *Tilton* and *Hunt* classrooms are no more neutral than the classes taught by publicly subsidized teachers in *Lemon*, all other things being equal. Obviously, all other things are not equal. What would be impermissible in an institution staffed by members of a particular faith, administratively controlled by a religious body, and dedicated to the inculcation of a particular faith, may well be permissible in an autonomous institution staffed by faculty hired on the basis of academic merit, where academic freedom prevails, and where courses are taught in accordance with the requirements of an academic discipline. The Court could validly require that the state monitor the content of teaching at the primary or secondary level to prevent even inadvertent lapses into religious indoctrination on the part of publicly subsidized teachers. Yet the Court could conclude

that such monitoring would not be necessary at a college which maintained its academic freedom and integrity" (A-15, A-16).

A comparison of the aid programs upheld in *Tilton* and *Hunt* with the present case reveals only a single distinction — the nature of the aid. In the two earlier cases, public funds were limited in their use to the construction of buildings, whereas here the aid program involves non-categorical grants which may be used for various non-sectarian purposes. It is respectfully submitted that the lower court was entirely correct in concluding that, in the context of this case, that distinction does not rise to constitutional dimensions.

In *Tilton* the grant monies involved were available for the construction of virtually any type of building, subject only to a prohibition against sectarian usage identical to the Maryland prohibition. Obviously a whole range of activities could occur in these buildings and the nature of the activities could vary from year to year. In essence, a single large construction grant would be used to finance a building which, while it may be devoted to entirely non-sectarian uses in its early years of operation, could conceivably be devoted to entirely different and perhaps sectarian uses in later years. This feature of the construction grant program obviously requires some continuing awareness on the part of the administering authorities, both of the continuing nature of the institution and of the various uses to which the buildings are devoted over an extended period of time. The necessity of maintaining this awareness in turn requires the administering authority to establish and continue a limited oversight relationship with the institutional aid recipient.

Appellants urge that the Maryland annual grant program should be sharply distinguished from the one-time construction grant involved in *Tilton v. Richardson*. But this ignores

the fact that, despite the one-time nature of a grant under the *Tilton* program, continuing governmental oversight of the use to which the completed facility is being put is required. The continuing expenditure oversight involved in annual grant programs offers no greater possibilities for entanglement than continuing use oversight.

Indeed, when one compares the entanglement possibilities of annual grants covering operating expense items with a single large grant or series of grants funding a facility which will be in use for years to come, one can perceive advantages to the former from both a primary effect and an entanglement perspective. In the case of an annual operating expense item, the funds are put to immediate and final use. Funds spent on 1974 operating expenses do not require any re-examination of the nature of the institution and its various programs in 1975, not to mention 20 years later. In facilities funding, every dollar spent carries with it a long-term sectarian use prohibition and the correlative long-term oversight relationship. When aid monies are spent on annual operating items, that same relationship may continue from year to year but the stakes are smaller since prior years' grants are no longer involved. In addition, if an institution's basic nature changes to pervasively sectarian, it can be ruled ineligible for further aid without having to worry about prior grants spent on permanent facilities. Obviously, in each type of program some kind of continuing awareness and relationship is necessary. But the mere fact that grants are made on an annual basis hardly increases the entanglement problems.

Despite the connotations of the phrase "religiously neutral facilities", a continuing awareness of the use to which a facility is put involves more than a knowledge of bricks and mortar alone. A class conducted in an institution of higher learning may take place in a classroom building, but

the sectarian or non-sectarian nature of that class (and, therefore, of the use of the building) obviously depends upon its professor, the course materials used, the manner in which the class is taught, and the overall character of the institution itself. Thus, to say that a class or classroom building is neutral and is put to a religiously neutral use necessarily requires some consideration or awareness of these non-physical matters.

In a primary or secondary school setting, where the students are younger and more impressionable and where one perceives, notwithstanding elements of academic discipline and freedom, a distinct or dominant purpose of the school to be the inculcation of particular religious values, it may indeed be impossible to satisfactorily monitor various types of aid programs without creating excessive entanglement. This Court's recent decisions in the primary and secondary education field have so indicated. See *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973); and *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

But the lesson of *Tilton* and *Hunt*, properly learned and applied by the lower court here, is that the situation is vastly different in institutions of higher learning which are not pervasively sectarian and which are characterized by a high degree of academic freedom and integrity.

The court below found that the secular aspects of the appellee colleges can be readily separated from the sectarian and that these separate secular aspects or programs are the only beneficiaries of State aid (A-19).[9] Because of the essen-

[9] No difficulty whatsoever is presented by the lower court's prohibition of aid to the institutions' religion course programs. The courses and instructors involved in these programs are readily identifiable and separable from the remainder of the curriculum.

tially academic and secular character of the colleges and the ready separability of their limited sectarian programs, the court quite properly concluded that:

> ". . . There is no necessity for state officials to investigate the conduct of particular classes of educational programs to determine whether a school is attempting to indoctrinate its students under the guise of secular education" (A-18).

The fact that such periodic investigations, and the entanglement problems which they could create, are not necessary, does not suggest that the Maryland Council for Higher Education will be unaware either of the evolving nature of the institutions or of the particular uses to which State funds are put. As noted earlier, the Council has substantial current expertise as to the character and purposes of all of the State's institutions of higher education derived from its other responsibilities wholly unrelated to the aid program here in question. As a consequence, the Council would perceive any future changes in the basic character of the institutions as they occur. The various administrative procedures adopted by the Council, from the verifications under oath to the submission of necessary follow-up data, and the availability of post-expenditure audits where clearly necessary, insure that the State will know what programs have been funded or facilities built with State aid. These procedures were found by the lower court to be effective, non-judgmental and non-entangling. There is nothing in any prior decisions of this Court to suggest in the least that that finding was erroneous as applied to institutions of higher education which do not hold religious indoctrination as one of their purposes.

The resulting relationship established here between the State and the private colleges involves no greater entanglement than was inherent in the *Tilton* aid program. Nor does

the Maryland program establish a relationship nearly as pregnant with entanglement potential as the landlord-tenant relationship present in *Hunt v. McNair, supra.* Some continuing relationship and some entanglement is obviously necessary and permissible, but only excessive entanglement is prohibited. In light of the recent decisions of this Court, the lower court was clearly correct in finding the relationship established by the Maryland program to be within constitutionally permissible bounds.[10]

III.

THE APPELLEE INSTITUTIONS SHOULD NOT BE REQUIRED TO REFUND MONIES HERETOFORE AWARDED THEM UNDER THE MARYLAND ACT.

Appellants do not appear to challenge the decision of the lower court declining to order a refund of monies paid in 1971 under the earlier version of the Maryland Act and prior to the initiation of this litigation. See pp. 22-23 of the Jurisdictional Statement. Their argument, rather, is limited to payments made to two institutions in 1974 relative to graduate degree programs and to the disbursements of escrowded funds made last month. Obviously if, as urged here, the lower court's decision on the merits was correct, then the issue of refund fails to present a substantial question.

Even if the lower court should be reversed, no refund would be in order. The first payments in question were made to Western Maryland and Loyola Colleges after the trial of the case below and the entry of the findings of fact. The payments were based solely on graduate degrees awarded and both colleges certified that the funds would be used for non-sectarian purposes and solely in connection with their

[10] The lower court also treated briefly and separately the question of political entanglement (A-21 to A-23). Whether or not this is to be viewed as a separate issue, the lower court was clearly correct in its conclusion and Appellants do not appear to argue otherwise.

graduate programs. This case, as filed, tried and decided, involves the college level programs of the institutions in question and not the graduate level programs. No evidence was introduced and no record was established with respect to graduate level programs. The belated and unsubstantiated request for injunctive relief against these payments was and remains totally without merit.

The second and more recent series of payments involves the funds which the State, during the two year pendency of the proceedings below, withheld from the appellee institutions not under judicial restraint but out of a responsible sense of caution and concern. These funds were paid out only after the lower court's decision in favor of the constitutionality of the Maryland Act and after the denial of Appellants' requests for injunctive relief pending appeal.

The issue of refund here, we submit, is controlled by this Court's decision in *Lemon v. Kurtzman*, 411 U.S. 192 (1973) [*Lemon II*] and the action taken on a stay application in *Robinson v. DiCenso*, 399 U.S. 918 (1970). In *Lemon II* this Court affirmed the refusal of the lower court to block payments which State officials proposed to make *after* the statute had been found unconstitutional but which represented reimbursement for educational services rendered before that decision (in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)). Notwithstanding the fact that the aid program there in question had been found unconstitutional prior to the payments, this Court ruled that State officials need not await the confirmation of a conclusive federal court ruling before implementing presumptively constitutional aid programs. As was said there:

> ". . . Until judges say otherwise, state officers — the officers of Pennsylvania — have the power to carry forward the directives of the state legislature. Those officials may, in some circumstances, elect to defer acting until an authoritative judicial pronouncement has

> been secured; but particularly when there are no fixed and clear constitutional precedents, the choice is essentially one of political discretion and one this Court has never conceived as an incident of judicial review." 411 U.S. at 208.

Here the State did defer for a reasonable time and has now elected to act following the favorable judicial pronouncement of a three-judge District Court. There is no reason whatsoever for disturbing that action. This is even more clearly illustrated by this Court's decision in *Robinson v. DiCenso, supra,* to stay the lower court's injunction, thus permitting payments to be made under a Rhode Island statute declared to be unconstitutional by the lower court in a decision which was later affirmed in *Lemon v. Kurtzman,* 403 U.S. 602 (1971).

CONCLUSION

For the reasons stated above, it is respectfully submitted that the questions presented herein are so unsubstantial as not to warrant further argument and that plenary review should not be granted and the lower court's decision should be summarily affirmed.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General of Maryland,

HENRY R. LORD,
Deputy Attorney General
of Maryland,

GEORGE A. NILSON,
Assistant Attorney General
of Maryland,

For State Appellees.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-730

JOHN C. ROEMER, III, EDWARD E. DOERR, KENNETH A. STEVENS, AND CYNTHIA KOONCE MILLER,

Appellants,

v.

BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND; MARVIN MANDEL, GOVERNOR; LOUIS L. GOLDSTEIN, COMPTROLLER; JOHN A. LUETKEMEYER, TREASURER; WESTERN MARYLAND COLLEGE; COLLEGE OF NOTRE DAME OF MARYLAND, INC.; MOUNT SAINT MARY'S COLLEGE; SAINT JOSEPH COLLEGE AT EMMITSBURG, MARYLAND, INC.; AND THE ASSOCIATED PROFESSORS OF LOYOLA COLLEGE OF THE CITY OF BALTIMORE, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

MOTION BY WESTERN MARYLAND COLLEGE, APPELLEE, TO AFFIRM

JOHN H. MUDD,
H. THOMAS HOWELL,
10 Light Street (17th floor),
Baltimore, Maryland 21202,
Attorneys for Appellee,
Western Maryland College.

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

MOTION BY WESTERN MARYLAND COLLEGE, APPELLEE, TO AFFIRM

Western Maryland College, one of the appellees herein, moves that the judgment of the District Court be affirmed on the ground that it is manifest from the appellants' own disclaimers of record that this appeal presents no substantial question involving the College.

STATEMENT OF THE CASE

Western Maryland College is a private, independent liberal arts college located in Westminster, Maryland, with a full-time enrollment of approximately 1,470 students. It was chartered in 1868 as the first institution south of the Mason and Dixon Line to admit both men and women. The charter requires the College to be operated "upon a most liberal plan, for the benefit of the youth of every religious denomination, who shall be freely admitted to equal privileges and advantages of education and to all of the literary honors of the College, without requiring or enforcing any religious or civil test, nor shall any prejudice be made in the choice of any officer or teacher in the said College on account of his or her particular religious profession, but regard shall be had to his or her moral character, literary abilities, and other necessary qualifications to fill the place for which he or she may be chosen" (R. 1099-1100).[1] Although the College for many years enjoyed a fraternal and mutually-voluntary association with the Methodist Church, it has always been independent and was never governed or controlled by any religious body. The College has completed a process of total disaffiliation and presently maintains no relation with any church (A. 26, n. 2; R. 1105-09).

The Jurisdictional Statement ignores these essential facts, although they were undisputed below. By drawing a composite profile of the five appellee colleges, its effect is to obscure the distinctive characteristics of Western Maryland College. The unreliability of the appellants' factual presentation is illustrated by their failure even to mention the pre-trial concessions sought and obtained by Western Maryland College.

[1] "R" refers to the record on appeal, "A" to appendices to the Jurisdictional Statement, and "T" to the trial transcript (May 29 — June 26, 1973).

This action was brought as a taxpayers' suit to enjoin payment of funds to five of the 18 private, non-profit institutions of higher education[2] receiving financial assistance under a Maryland statute. MD. CODE ANN. art. 77A, §§ 65-69 (A. 52-55). Relying upon the Establishment Clause of the First Amendment, and inspired perhaps by language in *Tilton v. Richardson*, 403 U.S. 672, 683 (1971), the taxpayers described the five "institutional defendants" (including Western Maryland College) in their complaint as "sectarian, educational institutions which are engaged in the teaching and practice of religion and a substantial purpose or activity of which is the inculcation of religious values * * *" (R. 18). The complaint further alleged:

> Each of the institutional defendants is a sectarian, educational institution which is engaged in the teaching and practice of religion and a substantial purpose of which is the inculcation of religious values. Each of the institutional defendants is controlled in whole or in part by a particular church. Each of the institutional defendants compels obedience to the dogmas and doctrines of a particular religion, requires instruction in theology and doctrine, and does everything it can to propagate religion (R. 19-20).

The complaint made no other allegations relating to Western Maryland College.

In its answer (R. 337-39), Western Maryland College denied the above-quoted allegations and thus challenged its status as an "institutional defendant." Taxpayers were afforded every opportunity to support their pleadings and, indeed, they required the College to answer four sets of

[2] In addition to the five appellee colleges, the other aid recipients (accounting for 75% of the funds granted by the Board of Public Works) include Johns Hopkins University, the University of Baltimore, Goucher College, Maryland Institute of Art, Hood College, Washington College, Capital Institute of Technology, St. John's College, Peabody Conservatory of Music, and four others.

interrogatories (R. 165, 444, 513, 578), produce more than 200 documents for their inspection (R. 466), and submit to two depositions of its officers. On the basis of their own extensive pre-trial discovery, and in response to comprehensive interrogatories served by the College (R. 468-79), taxpayers filed sworn answers on the eve of trial. These answers (R. 605-67) disclaimed each and every material allegation which their complaint had asserted against the College:

> 9. Plaintiff contends that all of the defendant institutions in this case *except for Western Maryland College* are sectarian. Plaintiff makes no contention as to non-defendant institutions.
>
> 10. Based upon the information obtained through discovery in this case, plaintiff does *not* contend that Western Maryland College is a sectarian institution.
>
> 14. Based upon the information obtained through discovery in this case, plaintiff does *not* contend that Western Maryland College requires attendance at religious activities.
>
> 16. Based upon the information obtained through discovery in this case, plaintiff does *not* contend that Western Maryland College requires obedience to religious doctrines.
>
> 18. Based upon the information obtained through discovery in this case, plaintiff does *not* contend that Western Maryland College requires attendance at religious instruction.
>
> 20. Based upon the information obtained through discovery, plaintiff does *not* contend that Western Maryland College holds itself out as an integral part of the religious mission of the Methodist Church.
>
> 22. Based upon the information obtained in discovery in this case, plaintiff does *not* contend that Western Maryland College inculcates religious values as a substantial purpose of the College.
>
> 26. Based upon the information obtained through discovery, plaintiff does *not* contend that Western Maryland College imposes religious restrictions on subjects or methods of instruction.

> 28. Based upon the information obtained through discovery in this case, plaintiff does *not* contend that Western Maryland College has attempted or is attempting to propagate a particular religion.
>
> 32. Based upon the information obtained through discovery in this case, plaintiff does *not* so contend [that prayer is recited in connection with classroom exercises].
>
> 33. Based upon the information obtained through discovery in this case, plaintiff does *not* so contend [that Western Maryland College is controlled in whole or in part by the Methodist Church].
>
> 35. Based upon the information obtained through discovery in this case, plaintiff does *not* so contend [that any practice or activity of a religious nature has operated to impair or restrict academic freedom of any student or faculty member of Western Maryland College].

Taxpayers did preserve two issues for resolution at trial. First, they suggested that the admissions policies had the effect of perpetuating a religious quota favorable to Methodists (R. 605-667, ¶12). At trial this contention was refuted by direct testimony of the dean of admissions (T. 1743-1800) and by expert analysis of admissions statistics covering a five-year period (T. 1805-43). This evidence demonstrated that recruitment and admissions decisions are made without regard to religious preferences of prospective students (R. 1110-18). The correctness of the District Court's express finding (A. 43-44) is not questioned on this appeal, insofar as it applies to Western Maryland College. Jurisdictional Statement, at 20-21.

The other issue reserved by taxpayers, in their answers to interrogatories, was a limited contention as to faculty hiring practices. While admitting that faculty appointments and promotions are generally not influenced by religious con-

siderations, taxpayers asserted "that all teachers of Religion are Methodist ministers" and "reserve[d] the right to determine [at trial] whether this is a religious restriction on faculty appointments" (R. 605-667, ¶24). At trial, however, taxpayers produced no further evidence on the subject and called no witnesses at all.

Because the latter issue brought focus upon its Department of Philosophy and Religion, the College introduced testimony by its president, the dean of the faculty, and two of the four departmental instructors. The record is undisputed that these four instructors were hired to the faculty not as clergymen but as competent scholars who hold doctorate (Ph.D.) degrees in non-religious subjects (R. 1125-27). Each of them competed for faculty appointment on the basis of superior academic qualifications and teaching potential, rather than because of religious preference (R. 1125-27, T. 17-19-21, 1727, 1728, 1736, 1740-42, 1851). The evidence also demonstrated, without contradiction, that all 24 courses in the Department (including the 12 concerning religion) are taught as academic disciplines as part of a liberal arts core curriculum, without any pro-Methodist "slant" or attempt to foster religious belief in students (A. 38-40, R. 1121-24, T. 1718, 1722, 1724-25, 1736-37, 1851, 1861, 1875, 1878). It is also undisputed that no student is obligated to take any course in religion (much less Christianity), but may satisfy graduation prerequisites by electing any one of several courses in philosophy. (A. 46, R. 1122-23, T. 1718, 1724).[3] Religion majors are few in number and constitute less than 2% of any graduating class (R. 1123, T. 1724, 1776-79, 1860-61).

[3] A statement in the District Court's opinion that theology or its equivalent "is a required course at each school" (A. 13) is a contradiction of that Court's own express finding of fact that no such course is required at Western Maryland College (A. 46 n. 7).

On the question of faculty selection, the District Court found no evidence of religious discrimination or favoritism (A. 41). On this appeal, taxpayers argue the contrary as to three of the appellee colleges but advance no such argument against Western Maryland College. Jurisdictional Statement, at 20.

After trial on the merits, during which taxpayers voiced no objection to the admission in evidence of their answers to interrogatories (T. 1676), the District Court issued findings of fact and entered judgment (A. 57-58), from which taxpayers have appealed (A. 59). Although writing in dissent, Circuit Judge Bryan nonetheless concurred in the result as to Western Maryland College:

> * * * I find it is no longer a church-affiliated or church-related institution within the scope of the constitutional inquiry now before the court. Plaintiffs in answer to this defendant's interrogatories explicitly disclaimed any contention that it is a school of that character and also disclaimed other immediately related aspects of the school's structure. * * *

(A. 26). As to Western Maryland College, then, the judgment below was unanimous.

ARGUMENT

To the extent that it purports to raise questions under the Establishment Clause, this appeal is controlled by principles declared in *Tilton v. Richardson*, 403 U.S. 672 (1971), and more recently in *Hunt v. McNair*, 413 U.S. 734 (1973), both of which upheld governmental programs of financial assistance to private institutions of higher education. The decision below, in upholding Maryland's program (as construed), signals no such departure from those principles as to require plenary review in this Court. See *Americans United for Separation of Church and State v. Bubb*, 379 F. Supp. 872 (D. Kan. 1974) (three-judge court).

But even if *Tilton* and *Hunt* are not wholly dispositive, the judgment may nonetheless be affirmed summarily as to Western Maryland College. This aspect of the case is patently devoid of merit. It was stripped of all vitality when the taxpayers abandoned their controversy against that particular College by disclaiming every material allegation against it. Even the dissenting judge has acknowledged that the conceded facts resolve any constitutional doubts as to that College. In short, this appeal is not merely insubstantial; as to Western Maryland College it is vexatious.

Taxpayers invite this Court to "assume that the appellee institutions conform to the *Tilton* colleges" (Jurisdictional Statement, at 8), but conveniently ignore their disclaimer of essential *Tilton* facts. *Tilton* and *Hunt* challenged — unsuccessfully — "institutions with admittedly religious functions" which were "governed" by sponsoring churches. *Tilton*, 687-88; *Hunt*, 743-44. But taxpayers withdrew such contentions against Western Maryland College. They have acknowledged that the College is not controlled in whole or in part by any church; they have disclaimed that it is attempting to propagate religion or inculcate its students with religious values. *Supra*, at 4-5, ¶¶20, 22, 28, 33. These record facts were corroborated by the sworn testimony of leading College representatives (T. 1722, 1736-37, 1861-64, 1875-78, 1884-85, 1891-92, 1901-07, 1910-11, 1916-17).

In *Tilton* and again in *Hunt*, a three-pronged test of the Establishment Clause was applied:

> First, does the Act reflect a secular legislative purpose? Second, is the primary effect of the Act to advance or inhibit religion? Third, does the administrative of the Act foster an excessive government entanglement with religion?

Tilton, 679; *Hunt*, 740. The secular purpose of the Maryland statute is not challenged on this appeal. The "primary effect"

and "entanglement" criteria, as applied to Western Maryland College, serves only to underline the futility of this branch of the appeal. In order to show a "primary effect", it was incumbent upon taxpayers to demonstrate that governmental aid "flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission". *Hunt*, 743. Similarly, "entanglement" depends "in very large measure with the extent to which religion permeates the institution". *Id*, 745. Since this record forecloses any contention that religion "pervades" or "permeates" Western Maryland College, there remains no question involving the College which deserves plenary review.

We invite the Court's attention to a recent opinion by a three-judge court in *Americans United for Separation of Church and State v. Bubb*, 379 F. Supp. 872 (D. Kan. 1974). In an analysis of *Tilton* and *Hunt* at least as searching as that undertaken below, the *Bubb* court proposed an eight-part standard for evaluating the 19 private colleges involved in that case (five of which were declared ineligible under that test). We recite each of the *Bubb* inquiries (together with the corresponding disclaimers set forth in taxpayers' answers to interrogatories):

> First, does any "College impose religious restrictions on admission of students?" *Bubb*, 892. (Taxpayers do not contend on this appeal that Western Maryland College imposes such restrictions. Jurisdictional Statement, 20-21, *Supra*, at 5).
>
> "A second consideration is whether the Colleges require attendance of pupils at religious activities." *Bubb*, 892. (Interrogatory answer 14 expressly disclaimed "that Western Maryland College requires attendance at religious activities". *Supra*, at 4).
>
> "Third, do any Colleges require obedience by students to the doctrines and dogmas of a particular faith?" *Bubb*, 892. (Interrogatory answer 16 expressly disclaimed

"that Western Maryland College requires obedience to religious doctrines". *Supra*, at 4).

"Fourth, do Colleges require pupils to attend instruction in the theology or doctrine of a particular faith?" *Bubb*, 893. (Interrogatory answer 18 expressly disclaimed "that Western Maryland College requires attendance at religious instruction". *Supra*, at 4).

"Fifth, are the Colleges an integral part of the religious mission of the church sponsoring them?" *Bubb*, 893. (Interrogatory answer 20 expressly disclaimed "that Western Maryland College holds itself out as an integral part of the religious mission of the Methodist Church." *Supra*, at 4).

"Sixth, do the Colleges have as a substantial purpose the inculcation of religious values?" *Bubb*, 893. (Interrogatory answer 22 expressly disclaimed "that Western Maryland College inculcates religious values a substantial purpose of the College." *Supra*, at 4).

"Seventh, do the Colleges impose religious restrictions on faculty appointments?" *Bubb*, 893. (Taxpayers do not contend on this appeal that Western Maryland College imposes such restrictions. Jurisdictional Statement, 20. *Supra*, at 5-7).

"Finally, do the Colleges impose religious restrictions on what or how the faculty may teach?" *Bubb*, 893. (Interrogatory answer 26 expressly disclaims "that Western Maryland College imposes religious restrictions on subjects or methods of instruction." *Supra*, at 4-5).

Far from posing justiciable issues of constitutional dimensions, this branch of the appeal marks only a routine failure by a litigant to make out a case against his adversary. It should be excised accordingly by summary affirmance. The burden was unquestionably upon the taxpayers to prove the extent to which the colleges were "church-related", if at all. *Hunt v. McNair*, 413 U.S. 734, 746 n. 8 (1973); *Board of Education v. Allen*, 392 U.S. 236, 248 (1968). As one of

the named defendants, Western Maryland College was entitled to learn through discovery the factual basis of the claims against it in order to prepare its defense. Taxpayers responded on the eve of trial by disclaiming, in sworn answers to interrogatories, every material allegation in their complaint directed against that College. In effect, they proclaimed under solemn oath that the College was free to ignore the allegations so withdrawn.

By including Western Maryland College in their appeal, taxpayers seek to resurrect those allegations and to require the College to explain or justify practices which they now claim to be inconsistent with the Establishment Clause. But this attempt simply ignores an admonition delivered, in an analogous context, on the very day that *Hunt* was decided: "No presumptions flow from mere allegations; no one can be required, consistent with due process, to prove the absence of violation of law". *Norwood v. Harrison*, 413 U.S. 455, 471 (1973).

CONCLUSION

For the foregoing reasons, we respectfully submit that as to this appellee, Western Maryland College, the judgment of the District Court is correct and should be affirmed without further briefs or argument.

Respectfully submitted,

JOHN H. MUDD,
H. THOMAS HOWELL,
Attorneys for Appellee,
Western Maryland College.

January, 1975.

Supreme Court, U. S.
FILED
JAN 10 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-730

JOHN C. ROEMER, III, EDWARD E. DOERR, KENNETH A. STEVENS, AND CYNTHIA KOONCE MILLER,

Appellants,

v.

BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND; MARVIN MANDEL, GOVERNOR; LOUIS L. GOLDSTEIN, COMPTROLLER; JOHN A. LUETKEMEYER, TREASURER; WESTERN MARYLAND COLLEGE; COLLEGE OF NOTRE DAME OF MARYLAND, INC.; MOUNT SAINT MARY'S COLLEGE; SAINT JOSEPH COLLEGE AT EMMITSBURG, MARYLAND, INC.; AND THE ASSOCIATED PROFESSORS OF LOYOLA COLLEGE OF THE CITY OF BALTIMORE, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

MOTION TO AFFIRM OF COLLEGE OF NOTRE DAME OF MARYLAND, INC.

GEORGE W. CONSTABLE,
1000 Maryland Trust Bldg.,
Baltimore, Maryland 21202,
Counsel for Appellee.

The Daily Record Co., Baltimore, Md. 21202

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-730

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Appellants,

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

MOTION TO AFFIRM

Appellee, College of Notre Dame of Maryland, Inc., pursuant to Rule 16 of the Supreme Court of the United States, moves the Court to affirm the judgment of the District Court of three judges in the United States District Court for the District of Maryland, on the grounds that the questions are so unsubstantial as not to warrant further argument.

QUESTIONS PRESENTED

Whether or not the District Court made a substantial error in its determination that the Maryland State aid to the Appellees did not violate two of the three specific tests established by the Supreme Court, viz:

A. The test that the aid should not foster excessive government entanglement with religion; and

B. The test that the aid should not have the primary effect of advancing religion.

The third test viz: that the legislative purpose be secular, has been conceded to have been met.

The question of a refund is not a substantial question in itself, but would only arise if the aid program is found unconstitutional by the Supreme Court.

STATEMENT

This is an appeal from the judgment of a three judge court finding (1) that the Maryland program for state aid to colleges (Maryland Annotated Code, Art. 77A, Section 65, et seq.) is constitutional on its face and as applied; (2) that the Appellants motion for an injunction against payments to Appellees is denied; and (3) that the Appellants motion for a refund of aid previously paid out is denied.

There was an exhaustive inquiry into the facts of the State program and into the nature and operations of each of the colleges who are Defendants in the case. This resulted in Findings of Fact by Judge Young which were subsequently adopted by the three judge District Court and constituted the sole factual basis upon which the opinion rested.

These finding establish that the Appellees are typical church-related liberal arts colleges very similar to those

involved in the case of *Tilton v. Richardson*, 403 U.S. 672 (1971); that they are not sectarian institutions, nor arms of any church, nor indoctrinating and proselytizing institutions; that such religious features as there are — such as chapels and theology courses — are typical of many liberal arts colleges and universities which concededly are not deemed sectarian; that such religious opportunities as are afforded are on a voluntary, non-compulsory basis; and that there are no religious quotas or requirements in faculty selection or student admissions.

ARGUMENT

There is no question raised by the Appellants in this Appeal as to what the basic tests of constitutionality are, nor as to the factors to be considered in applying these tests. Nor is there any serious question about the facts to which these tests and factors are to be applied; nor as to the guiding examples of application given by the Supreme Court in the leading cases.

The essential argument by the Appellant is that these tests and factors have not been properly applied by the District Court; and this in two respects.

I.

ENTANGLEMENT

Appellants argue that the State aid in this case would involve excessive government entanglement with religion, because unlike the situation in the *Tilton* case (a) the grants are not for "religiously neutral facilities" and (b) the grants are not one time, single purpose grants but involve on-going annual grants which would require continuous governmental audits and judgmental monitoring of the institutions.

Both of these points were fully and directly dealt with by the District Court.

As to (a) it was pointed out that the distinction between *Tilton* and this case was more apparent than real. The difference between specific "construction grants" for buildings intended for secular use and grants which are "non-categorical" (i.e., non-specific) as to type of secular use but which are restricted by a general, all-encompassing legal prohibition against use for any sectarian purpose whatever is a distinction which "does not rise to constitutional dimensions" (A-17 of Opinion in Appellants' Jurisdictional Statement). After all, it is not the building, but *what happens in the building over the years*, that gives rise to the possibility of entanglement. As the District Court said "The classroom building provided in *Tilton* and *Hunt* are no more neutral in the abstract than the classroom buildings which were maintained with public funds in *Nyquist*" (A-15).

The Appellants are attempting to convert the Supreme Court's observations in the *Tilton* case to the effect that payments for "ideologically neutral" buildings "reduced" the danger of entanglement (p. 686) into a formal Supreme Court requirement for constitutional validity of a grant.

As to (b), i.e., the danger arising out of on-going financial entanglement because the aid is not in the form of a single grant, again the District Court fully considered this and found that the continuing nature of the grants was not constitutionally fatal. For, after all, even in *Tilton*, where one time construction grants were permissible, there would obviously be

> "required a continuing and perpetual involvement of the government with the schools to ensure that publicly financed buildings would never be used for sectarian purposes" (A-20).

Further, as the District Court noted, in *Hunt v. McNair*, 413 U.S. 734 (1973)

> "the Supreme Court found the South Carolina Statute to be constitutional even though it established a school

> governmental relationship which was far more intimate and pervasive than any relationship likely to result from the statute now under consideration" (A-20-21).

And of course, many constitutionally permissible forms of state aid are on-going, annual programs involving continuing financial relationships — viz, aid for school textbooks, lunches, health programs, school buses, etc.

In short, neither the absence of a limitation of a grant for a single supposedly "neutral" building nor the presence of an on-going program are significant points under the existing tests and the applications thereof, developed by the Supreme Court. The District Court arrived at its decision by applying these tests and the related factors laid down by the Supreme Court, to the facts — including the facts that the institutions were at college rather than high school or elementary school level; that the institutions were non-sectarian liberal arts colleges; that the law provided a flat and all embracing prohibition against any use of the funds for sectarian purposes; and that the program was administered by a state agency capable of establishing adequate regulations and procedures to ensure such required use of the funds without undue surveillance.

II.

PRIMARY EFFECT

The Appellants secondly argue that the *primary effect* of the State aid was to advance religion in that (a) the aid program failed to guarantee that the funds would not advance religion in respect to use for teachers salaries, scholarships and maintenance of buildings; (b) the funds would support classes where prayers were sometime said, albeit voluntarily; (c) the fund were in support of institutions with alleged religious restrictions on faculty appointments (not true) and on student admissions (not true); and (d) the funds would support institutions which have a few compulsory theology

courses and which provide some religious opportunities and services on a voluntary basis.

Here again the District Court has fully dealt with the problem in the light of the principles laid down by the Supreme Court and in the light of the guiding applications thereof by the Supreme Court in the leading cases. The Supreme Court in *Hunt v. McNair*, *supra*, p. 743, has distinguished two applications of the "primary effect" rule:

> 1. There can be no aid to an institution which is essentially sectarian. It is clear from the Findings of Fact and the Opinion (including the dissent) that this is inapplicable to the Appellee institutions in this case; and
>
> 2. There can be no aid which funds a specifically religious activity in an otherwise substantially secular setting.

It is chiefly this last principle which Appellants charge to be violated in this case. Basically, the answer to Appellants charge is that: (a) the Appellee institutions are essentially secular; (b) that any sectarian activities are clearly separable from the secular activity; (c) that the State aid statute specifically forbids use of the fund for sectarian purposes; and (d) that the administrative agency is adequate to screen institutions and to verify and enforce this required secular use.

In short, both the spirit and letter of the Supreme Court's tests have been complied with. If the funds are, or will be, used exclusively for non-sectarian purposes, as they must be under the law, it can hardly be said that they are, or will be, used to advance religion in any of the senses charged by the Appellants.

As far as primary effect is concerned, there is no logical difference between a grant for specific secularly-used buildings (as in *Tilton*) and a grant for a range of possible secular purposes. A secular purpose is a secular purpose in either case. The only essential point is that the grant be earmarked and used for secular purposes. There is nothing in the cases, or law, or in logic, that makes it essential that the particular, specific use of the fund within the ambit of all possible secular uses be fixed at the legislative level. In fact, it would seem highly desirable to permit aided colleges to have flexibility of use within the constitutionally permissible range of secular uses, as long as there is adequate regulatory provision for accurate and relatively simple checking out of proper use. In any event the tests do not prescribe this.

CONCLUSION

In summary, it is suggested that the Appellants have not presented any issues or questions not already adequately decided under tests, and related factors, and applications evolved by the Supreme Court and followed by the District Court. To warrant a Supreme Court review would seem either to call for some clear departure by the District Court from these tests and related factors or to call for a showing that these tests and factors in the light of applications in the *Tilton*, *Hunt* and other cases, are not adequate to determine the issue. It is submitted that neither has been shown.

Respectfully submitted,

GEORGE W. CONSTABLE,
1000 Maryland Trust Bldg.,
Baltimore, Maryland 21202,
Counsel for Appellee.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-730

JOHN C. HOEMER, III, EDWARD E. DOERR, KENNETH A. STEVENS, AND CYNTHIA KOONCE MILLER, *Appellants*,

v.

BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND; MARVIN MANDEL, Governor; LOUIS L. GOLDSTEIN, Comptroller; JOHN A. LUETKEMEYER, Treasurer; WESTERN MARYLAND COLLEGE; COLLEGE OF NOTRE DAME; MOUNT SAINT MARY'S COLLEGE; SAINT JOSEPH COLLEGE; and THE ASSOCIATED PROFESSORS OF LOYOLA COLLEGE IN THE CITY OF BALTIMORE, INC., *Appellees*.

On Appeal from a Three-Judge United States District Court for the District of Maryland

MOTION TO AFFIRM

PAUL R. CONNOLLY
CHARLES H. WILSON
1000 Hill Building
Washington, D. C. 20006
Attorneys for Appellees Loyola College and Mount Saint Mary's College

Of Counsel:
JOHN C. EVERLUH
C. EDWARD JONES
1100 One Charles Center
Baltimore, Maryland 21201
WILLIAMS, CONNOLLY & CALIFANO
1000 Hill Building
Washington, D. C. 20006

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STATUTE:

Md. Code, Art. 77A, §§ 65-69 2-3

IN THE

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OCTOBER TERM, 1974

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On Appeal from a Three-Judge United States District Court for the District of Maryland

---

MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellees Mount Saint Mary's College and The Associated Professors of Loyola College in the City of Baltimore, Inc. ("Loyola College") move to affirm the judgment below on the ground that the district court faithfully adhered to and applied the constitutional

principles set forth in this Court's decisions on the Establishment Clause issues raised by this appeal, thus rendering the questions presented so unsubstantial that further review by this Court is unnecessary.

QUESTIONS PRESENTED

1. Whether further review is warranted in light of the several recent decisions by this Court setting forth the governing constitutional principles on the Establishment Clause questions presented by this appeal and the district court's faithful adherence to and application of those governing principles in upholding the Maryland college aid program.

2. Whether the Maryland college aid program challenged by the appellants has generated a primary effect that either advances or inhibits religion.

3. Whether the administration of the Maryland college aid program has resulted in excessive government entanglement with religion.

4. Whether, if the Maryland college aid program is unconstitutional, the appellee colleges should be required to pay back funds awarded and paid to them during a period when the program had been declared constitutional.

STATEMENT OF THE CASE

A. The Challenged Statute

At its 1971 session, the Maryland General Assembly enacted a program of aid to private colleges and universities in the state to help alleviate the growing financial problems shared by those schools with private institutions of higher learning throughout the nation.

Md. Code, Art. 77A, §§ 65-69.[1] As the court below noted in its opinion, the formula by which funds appropriated under the aid program have been allocated among private colleges and universities in the state has been altered since the statute's enactment. J.S. App., pp. A-5 to A-6. Throughout its existence, however, the aid program has been designed to provide general-purpose grants to institutions that meet statutory eligibility requirements. In 1972, at its first session following this Court's decision in *Tilton* v. *Richardson,* 403 U.S. 672 (1971), the Maryland General Assembly amended the statute to prohibit colleges receiving funds under the aid program from using those funds for "sectarian purposes." Md. Code, Art. 77A, § 68A.

To qualify for aid under the program, a college must (1) be nonprofit and accredited by the Maryland Department of Education, (2) have been in existence prior to July 1, 1970, (3) maintain one or more earned degree programs culminating in an associate in arts or baccalaureate degree, and (4) not award only seminarian or theological degrees. Md. Code, Art. 77A, § 66. The aid program is jointly administered by the appellee Board of Public Works and the Maryland Council for Higher Education ("Maryland Council"). Md. Code, Art. 77A, § 68. The evidence presented in the court below revealed, however, that the principal administrative responsibility rests with the Maryland Council, "which has considerable expertise as to the character and programs of the State's institutions of higher education derived from its other responsibilities." J.S. App., p. A-17.

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[1] The challenged statute is reprinted at pages A-52 to A-56 of the Appendix to the Jurisdictional Statement. The Appendix will be cited throughout this Motion as "J.S. App."

The Maryland Council engages in a two-level screening process "to ensure that funds are not improperly used." *Id.* The first level of screening involves an evaluation of applicant institutions to determine if they award principally theological or seminarian degrees, J.S. App., pp. A-17 to A-18, or if their educational programs are principally religious in nature. R. 1578-80, 1588-90.[2] Several institutions have been disqualified from receiving aid under that screening process. J.S. App. p. A-47.

The second level of screening involves a determination by the Maryland Council of whether funds paid to eligible colleges have been improperly spent in light of the statutory prohibition against "sectarian" use of those funds. At the time that a college applies for its annual grant, its president is required to verify that the funds will not be used for sectarian purposes. At the end of the fiscal year in which a grant is received, the college must submit a utilization-of-funds report detailing how the funds were spent. That report must be accompanied by an affidavit verifying that none of the expenditures were for sectarian purposes. J.S. App., pp. A-47 to A-48.

The Maryland Council has developed procedures for making further inquiry of colleges if their initial utilization-of-funds reports do not contain sufficient detail to permit evaluation of whether the funds were spent for proper purposes. The Maryland Council also can request a state audit of the grant funds if necessary, but "[t]he usage verification and the normal annual accounting which each college conducts" generally makes an audit unnecessary. J.S. App., p. A-48.

---

[2] "R." refers to the trial transcript of this case.

B. The Proceedings Below

The appellants, four taxpayers of the State of Maryland, filed their complaint on March 29, 1972 alleging that the aid program they challenged violated the Establishment Clause of the First Amendment. Named as defendants were the Board of Public Works, three state officials who comprise the Board of Public Works and five colleges that had received state funds under the aid program.[3] The critical allegations of the complaint were that the five named colleges were "sectarian educational institutions" at which religion and religious activities infused the total educational program. Appellants requested an injunction against future operation of the aid program and an order requiring the appellee colleges to repay grant funds paid to them. A district court of three judges was convened pursuant to 28 U.S.C. §§ 2281, 2284.

After the disposition of several pre-trial motions, the appellants engaged in extensive discovery. The trial commenced on May 29, 1973 and continued intermittently over a period of several weeks, ending on June 26, 1973. The transcript of the trial is 1923 pages in length and contains the testimony of the presidents and staff and faculty members of the appellee colleges, one expert witness on the teaching of religion at the undergraduate level, and the staff member of the Maryland Council who administers the challenged aid program. In addition, the parties introduced several hundred documents into evidence.

At the conclusion of the trial, the parties submitted extensive proposed findings of fact and lengthy briefs

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[3] In addition to Loyola College and Mount Saint Mary's College, the appellee institutions are Western Maryland College, College of Notre Dame and St. Joseph College.

on the legal questions presented. Following oral argument, the court below issued its decision on October 16, 1974, ruling that the challenged statute was constitutional and that payment of public funds to the appellee colleges did not offend the Establishment Clause. J.S. App., p. A-1. Circuit Judge Bryan dissented. *Id.* at p. A-26. The court also entered separate findings of fact, to which all three judges subscribed. *Id.* at p. A-35.

C. The Decision Below

The court below found no merit in appellants' constitutional claims by applying the three-part Establishment Clause test of purpose, primary effect and excessive entanglement that this Court's decisions have evolved over the past several years. See *Lemon* v. *Kurtzman,* 403 U.S. 602, 612-13 (1971); *Tilton* v. *Richardson,* 403 U.S. 672, 678 (1971). The court below also scrupulously observed the sharp constitutional line this Court's decisions have drawn between public aid to the higher and lower levels of church-related education. See *Tilton* v. *Richardson, supra,* 403 U.S. at 685-86; *Committee for Public Education* v. *Nyquist,* 413 U.S. 756, 777 n.32 (1973).

Since there was no serious dispute that the challenged statute had the requisite secular purpose, the court below focused on the primary effect and excessive entanglement branches of the controlling Establishment Clause test. In evaluating the primary effect of the challenged aid program, the court below carefully considered the two factors that this Court has isolated to determine whether the primary effect is to advance religion—namely, whether the aid in question "flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or . . . funds a specifically religious function in an otherwise substantially secular setting." *Hunt* v. *McNair,* 413 U.S. 734, 743 (1973).

With respect to the first of those factors, the court below concluded that the appellee colleges "are not so pervasively sectarian that aid [to them] would have a primary effect of advancing religion." J.S. App., p. A-11. That conclusion was based on the court's specific finding that the appellee colleges "conform closely to the colleges approved in *Tilton* v. *Richardson, supra.*" J.S. App., pp. A-10 to A-11. The court buttressed that conclusion by its particularized findings that none of the appellee colleges practice religious discrimination in faculty hiring and student admissions, that none compel their students to attend religious exercises, that religion does not in any way slant the content of courses taught by the appellee colleges and that all of the colleges foster an atmosphere of unfettered academic freedom. J.S. App., pp. A-38 to A-45; *compare Tilton* v. *Richardson, supra,* 403 U.S. at 686-87.

The court below also ruled that the challenged aid did not have an invalid primary effect because "[t]he aid program . . . cannot be said to fund a 'specifically religious activity in a secular setting.'" J.S. App., p. A-11. That ruling was based on the court's finding that "there are sufficient safeguards [in the statute and its administration] to prevent the use of funds for sectarian purposes." *Id.* at p. A-12. The court qualified that conclusion in only one respect. Because the court in its findings stated it was legally without the power to determine how religion and theology courses at the

appellee colleges were taught, *Id.* at p. A-46, it ruled that using state funds to support such courses "cannot be justified." *Id.* at pp. A-12 to A-13. Because the court had found that the statutory prohibition against the use of state funds for sectarian purposes "must be interpreted as encompassing the study of religion or theology," *Id.* at p. A-50, the court ruled that the Maryland Council "must take steps to ensure that public funds are not used to support such programs." *Id.* at p. A-13.[4]

In its excessive entanglement analysis, the court below noted that this Court's decisions required it to evaluate the "character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between government and the religious authority." J.S. App., p. A-14. The appellants argued below, as they argue in their Jurisdictional Statement, that the nature of the aid provided is the critical variable in the entanglement equation and that the aid in question here is constitutionally infirm because, unlike the federal grants approved in *Tilton* v. *Richardson, supra,* it is not ideologically neutral. In an extensive analysis, the court below rejected that argument, *Id.* at pp. A-14 to A-21, relying principally on this Court's ruling in *Hunt* v. *McNair, supra,* that "the degree of entanglement . . . varies in large measure with the extent to which religion permeates the institution." *Id.* at p. A-16. Because the court below had already found that

[4] Despite the professed inability of the court below to characterize how theology and religion are taught at the appellee colleges, it stressed that it was making no finding that those courses were in fact taught in a sectarian manner at those institutions. J.S. App., p. A-50 n.9.

the appellee colleges varied hardly at all in their character and purposes from the colleges involved in the *Tilton* case, it concluded that "[t]he relationship between church and state which results from this aid program is not entangling." *Id.* at p. A-17. Significantly, the court below also noted that the aid program this Court approved in *Hunt* v. *McNair, supra,* "established a school-governmental relationship which was far more intimate and pervasive than any relationship likely to result from the statute now under consideration." *Id.* at p. A-21.

The dissent expressed no serious disagreement with the majority's analysis of how the aid program has functioned to date or of the essentially secular character of the appellee colleges. In fact, it would appear that the dissenting judge subscribed fully to the findings of fact entered by the full court. Rather, the dissent was based on the fear that the challenged aid program had the "potential" for generating an invalid primary effect or excessive entanglement sometime in the indefinite future. J.S. App., pp. A-28, A-32, A-34.

ARGUMENT

A. Further Review Is Not Warranted

Since June 1971, this Court has issued several major decisions which have defined with particularity and in a variety of factual contexts the limitations the Establishment Clause imposes on government's power to provide public funds to church-related educational institutions. *Committee for Public Education* v. *Nyquist,* 413 U.S. 756 (1973); *Levitt* v. *Committee for Public Education,* 413 U.S. 472 (1973); *Sloan* v. *Lemon,* 413 U.S. 825 (1973); *Hunt* v. *McNair,* 413 U.S. 734 (1973); *Tilton* v. *Richardson,* 403 U.S. 672 (1971);

Lemon v. *Kurtzman*, 403 U.S. 602 (1971).[5] No other constitutional question has received such concentrated and definitive treatment by this Court during that period.

Those several decisions have evolved a rather precise test for evaluating the constitutionality of such aid programs, requiring an examination of the purpose of a challenged program and its primary effect and a determination of whether the program will foster excessive government entanglement with religion. *Lemon* v. *Kurtzman, supra*, 403 U.S. at 612-13. Those decisions have also drawn a sharp constitutional line between aid to church-related institutions of higher education and aid to the lower levels of church-related education. See, *e.g.*, *Tilton* v. *Richardson, supra*, 403 U.S. at 685-86. Since June 1971, this Court has struck down each program of aid to church-related elementary and secondary schools it has considered. By contrast, during the same period the Court has sustained each program of aid to church-related colleges that it has reviewed.

With respect to the Establishment Clause issue presented by this appeal, this Court has clearly fulfilled its constitutional duty to define the controlling constitutional criteria and to illustrate the application of those criteria in a variety of factual contexts. The time has now come to permit the lower courts to apply those criteria as challenges to new aid programs arise. Any other approach would necessarily require that this Court review each and every educational aid program

[5] See also *Durham* v. *McLeod*, 413 U.S. 902 (1973); *Grit* v. *Wolman*, 413 U.S. 901 (1973); *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973); *Wolman* v. *Essex*, 409 U.S. 808 (1972); *Sanders* v. *Johnson*, 403 U.S. 955 (1971).

enacted by state legislatures and Congress in response to the financial crisis currently confronting private education in this country.

These appellees submit that plenary review by this Court of the Establishment Clause issue presented by this appeal is warranted only if the appellants can demonstrate convincingly that the court below disregarded the governing constitutional criteria established by this Court or applied those criteria in a manner inconsistent with the fundamental principles underlying those criteria. These appellees further submit, and will demonstrate below, that appellants have not made and cannot make any such showing. Even a cursory reading of the decision below, and the findings of fact upon which it is based, will reveal that the district court strictly and faithfully adhered to and applied the governing constitutional criteria set forth in this Court's recent decisions. Thus, the decision below should be summarily affirmed.

B. Primary Effect

This Court's decision in *Hunt* v. *McNair, supra*, succinctly delineated the scope of judicial inquiry to determine whether an aid program that benefits church-related colleges[6] has the primary effect of advancing religion.

[6] It is important to note that a total of 18 colleges and universities have received aid under the challenged Maryland program. J.S. App., p. A-37 n.2. More than two-thirds of those institutions have no religious affiliations. *Id.* at p. A-9. Thus, that program can in no sense be characterized as "a blunderbuss discharge of public funds to church-affiliated or church-related colleges," as the dissent does. *Id.* at p. A-29. The appellee colleges that are church-related receive funds under the program not because they are church-related but because they satisfy the religiously neutral eligibility requirements prescribed by the statute.

> "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise secular setting." 413 U.S. at 743.

It is that precise test that the court below applied in ruling that the Maryland aid program did not have an invalid primary effect. J.S. App., pp. A-10 to A-13.

Two central considerations underlie that primary effect ruling. First, the court below specifically found that the appellee colleges, in their character, purposes and educational programs, are virtual mirror images of the four church-related colleges held eligible for public funds in *Tilton* v. *Richardson, supra.* J.S. App., pp. A-10 to A-11. If direct grants to the *Tilton* colleges did not have the primary effect of advancing religion, it necessarily follows that direct grants to the appellee colleges can have no such invalid primary effect. Second, the review of the evidence by the court below satisfied it that "there are sufficient safeguards [in the statute and its administration] to prevent the use of funds for sectarian purposes." *Id.* at p. A-12. Indeed, with respect to these appellees, the court specifically found that they had not used grants awarded them for any religious purpose. *Id.* at pp. A-50 to A-51.

The dissent did not seriously quarrel with the majority's conclusions on those questions. It simply feared that there was a "potential" for an improper use of public funds at sometime in the indefinite future. *Id.* at p. A-28. However, this Court has specifically

rejected that argument as a basis for invalidating an aid program.

> "A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement . . . . But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional." *Tilton* v. *Richardson, supra,* 403 U.S. at 679.

Similarly in this case the specter of potential abuse raised by the dissent and appellants cannot cause the Maryland program to fall when the evidence demonstrates overwhelmingly that the primary effect of the program is not to advance religion in any manner.

Appellants' contention that the court below erred in its primary effect ruling is grounded in their fundamental misunderstanding of this Court's controlling Establishment Clause decisions and in their invitation to this Court to review the sufficiency of the evidence underlying the findings of fact below.

Appellants' principal primary effect argument is that the Maryland program provides no "guarantee" that public funds will not be used to advance religion. J.S., pp. 16-18. In developing that argument, appellants itemize a number of purposes for which the appellee colleges might use their state grants, such as payment of faculty salaries, scholarships and building maintenance. Appellants contend that this Court's decisions prohibit such use of public funds by church-related schools, relying principally on the *Lemon* and *Nyquist* decisions. Appellants ignore the fact that those two cases involved church-related elementary and secondary schools, which this Court ruled were

pervasively sectarian in nature. However, this Court has expressly ruled that "[t]here are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools." *Tilton* v. *Richardson, supra,* 403 U.S. at 685. Thus, a particular use of public funds which may be impermissible in the parochial elementary and secondary school setting is not necessarily improper in the context of church-related higher education.

One example of this critical distinction will suffice. In the *Lemon* case, this Court invalidated aid programs which provided public funds to pay the salaries of teachers in parochial elementary and secondary schools. The Court noted that the typical parochial school teacher "is employed by a religious organization, subject to the direction and discipline of religious authorities, and works in a system dedicated to rearing children in a particular faith." 403 U.S. at 618. As the findings of fact entered by the court below convincingly demonstrate, the faculty members at the appellee colleges function in an educational environment that does not even remotely resemble that described in *Lemon.* Indeed, the court below expressly found that those faculty members "feel no religious pressures, by anyone, on their classroom presentation or their selection of texts and course materials." J.S. App., p. A-38. Thus, the constitutional dangers that this Court perceived in teacher payment programs in *Lemon* are totally absent from the higher education setting of this case.

Moreover, the appellants' assertion that the state has not "guaranteed" that public funds will not be

used for religious purposes is a patent distortion of the Maryland aid program and the evidence in this case. To the extent that use of grant funds to pay a chaplain's salary or to repair and maintain a chapel constitutes a religious use of public money, such expenditures are clearly prohibited by the sectarian use proscription of the statute. And the court below has expressly found that the administration of the aid program contains sufficient safeguards to assure there will be no such misuse of public money.

The remainder of the appellants' primary effect arguments are based on their disagreement with the findings of fact entered by the court below. To accept those arguments, this Court would, in effect, have to undertake a *de novo* review of the extensive evidentiary record in this case to determine whether there is sufficient evidence to support the findings. These appellees submit that, if the Court wishes to undertake such a review, it will find the evidence supporting the findings is not simply sufficient but overwhelming. Yet, the appellants ground their primary effect argument on evidence wrenched from context and totally at odds with the carefully considered findings of fact entered by the court below. A few examples of the conflict between appellants' arguments and the findings will suffice.

1. *Classroom Prayers:* Appellants contend that public funds under the challenged aid program are being used to support the practice of classroom prayers at the appellee colleges. Not only did the court below find the incidence of classroom prayers at Loyola College and Mount Saint Mary's College to be "miniscule," it also found no evidence that public funds were

being used in any fashion to support that isolated practice. J. S. App., pp. A-39 to A-40.[7]

2. *Religious Discrimination:* Appellants contend that the appellee colleges impose religious restrictions on faculty hiring and "perpetuate de facto religious restrictions on student admissions." J.S., pp. 20-21. The court below expressly found that the appellee colleges impose no religious restrictions on faculty hiring and student admissions. J.S. App., pp. A-40 to A-41, A-44.

3. *Advancement of Religion:* Appellants note that the appellee colleges require students to take some courses in theology as part of their liberal arts core curriculum. Appellants further note that "the study of religion or theology may become an instrument for strengthening the students' religious life." J.S., p. 21. Appellants ignore the fact that, although the court below declined to determine whether the theology courses in question were taught in an academic fashion, it specifically refused to make the finding that the appellants imply—namely, that the appellee colleges teach theology in a sectarian fashion. J. S. App., p. A-50 n. 9. Moreover, this Court ruled that aid to the colleges in *Tilton* did not have a primary effect of advancing religion even though each of those institutions required students to take theology courses. 403 U.S. at 686-87.

Thus, the appellants have provided no credible basis for concluding that the court below erred in its pri-

[7] It should be noted that the record in the *Tilton* case showed that at least one of the colleges involved in that case had a policy of permitting classroom prayers. Brief of Appellee Colleges and Universities. p. 11a. *Tilton* v. *Richardson, supra.* This Court, however, did not rule that aid to a college having such a practice had a primary effect of advancing religion.

mary effect ruling. That ruling was based on a strict adherence to the criteria set down in this Court's controlling Establishment Clause decisions. Appellants' arguments to the contrary are based on their misunderstanding of those decisions and their deliberate distortion of the evidentiary record in this case.

C. Excessive Entanglement

Whether an educational aid program engenders excessive governmental entanglement with religion requires an examination of

> "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." *Lemon* v. *Kurtzman, supra,* 403 U.S. at 615.

In applying those three factors in *Tilton* v. *Richardson, supra,* the Court did state that "[n]o one of these three factors standing alone is necessarily controlling." 403 U.S. at 688. However, an examination of the entanglement analyses by the Court in *Lemon, Tilton* and *Hunt* v. *McNair, supra,* reveals that one of those three factors—the character and purposes of the institutions that are benefited—is indeed the critical variable in the entanglement equation.

Thus, in *Lemon* the Court stated that "[t]he substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid." 403 U.S. at 616. By contrast, the Court in *Tilton* found that, because religious indoctrination was not a substantial purpose of church-related colleges, there was less likelihood that religion would spill over into

the secular educational program, thus reducing the risk that public funds will support religious activity. The Court added: "Correspondingly, the necessity for intensive government surveillance is diminished and the resulting entanglements between government and religion lessened." 403 U.S. at 687. Subsequently, in *Hunt* v. *McNair,* the Court articulated the obvious conclusion that flowed from the conflicting results in *Lemon* and *Tilton* on the entanglement question.

> "The Court's opinion in *Lemon* and the plurality opinion in *Tilton* are grounded on the proposition that the degree of entanglement . . . varies with the extent to which religion permeates the institution." 413 U.S. at 746.

Consistent with that observation in *Hunt,* the court below evaluated the risk of entanglement under the Maryland aid program principally by reference to the extent to which religion infused the educational programs of the appellee colleges. J.S. App., pp. A-14 to A-21.

Because the appellee colleges are virtually identical in the character, purposes and educational programs to the *Tilton* colleges, the court below concluded that the risk of excessive governmental entanglement with religion under the Maryland program was no greater than in *Tilton* and *Hunt.* The court noted that "these schools perform essentially secular educational functions and are quite similar to the defendant schools in *Tilton.* Religion does not permeate the secular educational functions of these schools." J.S. App., p. A-14. Since the statute requires the appellee colleges to confine the use of their grant funds to their secular educational functions, the state's supervision of the use of those funds will bring it into contact with the secular,

and not the religious, activities of those institutions. Thus, the administration of the aid program will result in no government involvement, let alone entanglement, with religion.

The appellants, however, insisted in the court below, as they do in their Jurisdictional Statement, that the nature of the aid provided is the critical variable in the entanglement analysis. They contend that prohibited entanglement can be avoided only if the aid provided is "ideologically neutral." While the appellants have been somewhat vague in defining the type of "ideological" neutrality they would impose on educational aid programs, the thrust of their agument would limit such programs to grants to construct the type of buildings involved in *Tilton.*

Based on this Court's decisions, the court below correctly rejected that argument. It is impossible to understand how the appellants can characterize the aid provided under the Maryland program as "ideological" in nature. The state is simply providing private colleges with money to help them support their secular educational programs. There is certainly nothing ideological about money. As the court below stated:

> "What emerges from a consideration of [the Supreme Court's] cases is the conviction that the ideological neutrality of a particular program of aid is dependent on the type of institution being benefited. The classroom buildings provided in *Tilton* and *Hunt* are no more neutral in the abstract than the classroom buildings which were maintained with public funds in *Nyquist.* The classes taught in *Tilton* and *Hunt* classrooms are no more neutral than the classes taught by publicly subsidized teachers in *Lemon.* . . ." J.S. App., pp. A-15 to A-16.

An aid program acquires an ideological coloration, if at all, from the institutions that benefit from it. Since the appellee colleges are virtually identical in their character, purposes and educational programs to the *Tilton* colleges, the aid provided the appellee colleges is no more ideological than the aid provided in *Tilton*.

There is, of course, a difference between the type of aid provided under the Maryland program and the federal aid upheld in *Tilton*. The federal program provided special-purpose grants that could be used only for the construction of academic facilities. The Maryland program provides general-purpose, non-categorical grants that a recipient institution can use for any aspect of its secular educational program. However, as the court below ruled, the distinction between special-purpose and general-purpose grants "does not rise to constitutional dimensions." J.S. App., p. A-17. The Establishment Clause requires only that a church-related college receiving aid not use it for religious purposes, and the Maryland program imposes that very restriction on grant recipients. As long as that restriction is observed, it is constitutionally irrelevant that the aid be in the form of special-purpose or general-purpose grants.

The appellants also complain that the relationships that exist between state officials and the appellee colleges have resulted in excessive entanglement between government and religion. The court below came to the opposite conclusion based on its careful examination of the entire evidentiary record in this case. The court specifically ruled that "[t]he relationship between church and state which results from this program is not entangling." J.S. App., p. A-17. Indeed, the court below found that the relationship between state

officials and the appellee schools in the administration of the Maryland program is far less intimate and pervasive than the relationship that this Court ruled was non-entangling in *Hunt* v. *McNair, supra. Id.* at pp. A-20 to A-21.

Thus, there can be no question that the court below correctly concluded that the Maryland aid program challenged by the appellants has not resulted and will not result in excessive government entanglement with religion.

D. Repayment of Grants

In addition to seeking to enjoin the future operation of the Maryland aid program, the appellants requested in their complaint that the appellee colleges be ordered to repay all funds that have been awarded and paid to them under the program. The court below denied that relief with respect to the grants paid the appellee colleges prior to the initiation of this litigation. Appellants now seek similar relief from this Court.

If there is any legal obligation on the appellee colleges to repay the grants they have received, it will not arise, if at all, until this Court declares the Maryland aid program unconstitutional. Thus, that question is clearly premature at this stage of the appeal of this case. If the Court sets this case for plenary hearing, however, these appellees will argue in their brief on the merits that the equitable principles enunciated in *Lemon* v. *Kurtzman,* 411 U.S. 192 (1973), would bar the appellants from obtaining an order for repayment of funds received by the appellee colleges during a period when the challenged aid program had been declared constitutional.

CONCLUSION

The judgment below should be affirmed summarily because the district court's faithful adherence to and application of the controlling Establishment Clause principles repeatedly articulated by this Court have rendered unsubstantial the questions the appellants ask this Court to review.

Respectfully submitted,

PAUL R. CONNOLLY
CHARLES H. WILSON
1000 Hill Building
Washington, D. C. 20006
Attorneys for Appellees
Loyola College and Mount
Saint Mary's College

Of Counsel:

JOHN C. EVELIUS
C. EDWARD JONES
1100 One Charles Center
Baltimore, Maryland 21201

WILLIAMS, CONNOLLY & CALIFANO
1000 Hill Building
Washington, D. C. 20006

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 730

JOHN C. ROEMER, III, EDWARD E. DOERR, KENNETH A. STEVENS, and CYNTHIA KOONCE MILLER,

Appellants,

—v.—

BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND; MARVIN MANDEL, Governor; LOUIS L. GOLDSTEIN, Comptroller; JOHN A. LUETKEMEYER, Treasurer; COLLEGE OF NOTRE DAME OF MARYLAND, INC.; MOUNT SAINT MARY'S COLLEGE; SAINT JOSEPH COLLEGE AT EMMITSBURG, MARYLAND, INC.; and THE ASSOCIATED PROFESSORS OF LOYOLA COLLEGE IN THE CITY OF BALTIMORE, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BRIEF FOR APPELLANTS

LAWRENCE S. GREENWALD
Attorney for Appellants
1200 Garrett Building
Baltimore, Maryland 21202

MELVIN L. WULF
American Civil Liberties
Union Foundation
22 East 40th Street
New York, N. Y. 10016
Of Counsel

RECORD PRESS, INC., 95 MORTON ST., NEW YORK, N. Y. 10014—(212) 243-5775
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No. 730

JOHN C. ROEMER, III, EDWARD E. DOERR, KENNETH A. STEVENS, and CYNTHIA KOONCE MILLER,

Appellants,

v.

BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND; MARVIN MANDEL, Governor; LOUIS L. GOLDSTEIN, Comptroller; JOHN A. LUETKEMEYER, Treasurer; COLLEGE OF NOTRE DAME OF MARYLAND, INC.; MOUNT SAINT MARY'S COLLEGE; SAINT JOSEPH COLLEGE AT EMMITSBURG, MARYLAND, INC.; and THE ASSOCIATED PROFESSORS OF LOYOLA COLLEGE IN THE CITY OF BALTIMORE, INC.,

Appellees.

ON APPEAL FROM A UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

BRIEF FOR APPELLANTS

OPINIONS BELOW

The majority and dissenting opinions of the three judge district court for the District of Maryland are reported in Roemer v. Board of Public Works of State of Maryland, 387 F. Supp. 1282 (D. Md. 1974). Certain preliminary rulings not at issue here are reported in American Civil Liberties Union of Maryland v. Board of Public Works of State of Maryland, 357 F. Supp. 877 (D. Md. 1972).

JURISDICTION

The judgment of the district court was filed on October 21, 1974. A./1 57-58. A notice of appeal therefrom was filed on October 25, 1974.

/1 Abbreviations in this brief refer to the following:

"A." -- Appendix to Jurisdictional Statement

"App." -- Single Appendix

"R." -- Trial transcript

"PX" -- Plaintiffs' Exhibit

"DX -- Defendant's Exhibit

"Rec." -- Record

This Court noted probable jurisdiction on March 24, 1975. Jurisdiction is conferred by 28 U.S.C. §1253.

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in part:

> "Congress shall make no law respecting an establishment of religion ...".

The Fourteenth Amendment, Section 1, to the United States Constitution provides in part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The challenged legislation, Annotated Code of Maryland, Article 77A, §§65-69, as amended, is printed in the appendix to jurisdictional statement at A.52-56.

QUESTIONS PRESENTED

I. Whether the Act is unconstitutional because continuing payments of undefined aid to church related institutions and

continuing state analyses to guarantee that aid is not used for religious purposes necessarily foster excessive government entanglement with religion or the potential therefor.

II. Whether the primary effect of the Act is to advance religion in the following respects:

A. Its failure to guarantee that state aid will not be used to advance religion.

B. Its financial support of classes in which prayer is regularly recited.

C. Its financial support of institutions which impose religious restrictions on faculty appointments and perpetuate de facto religious restrictions on student admissions.

D. Its financial support of institutions whose secondary purpose is to encourage spiritual development and which require students to take a limited range of courses in theology and doctrine taught primarily or exclusively by clerics of the affiliated church.

E. Its financial support of sectarian institutions.

III. Whether, if the challenged legislation is unconstitutional, appellees should be required to refund all payments not enjoined upon motions or application timely filed by appellants.

STATEMENT OF THE CASE

Proceedings Below

This action challenges the constitutionality of Maryland legislation (herein sometimes called "the Act") which authorizes direct payments of public aid to both church related and non-church related colleges and universities. A.2-3, 52-55. Appellants, plaintiffs below, are four Maryland citizens and taxpayers (A.2), who have standing pursuant to Flast v. Cohen, 392 U.S. 83 (1968). Appellants contend that the Act is a law respecting an establishment of religion in violation of the First and Fourteenth Amendments to the United States Constitution. They seek injunctive and declaratory relief against the governor, comptroller and treasurer of Maryland, constituting the Board of Public Works of the State of Maryland, and four/2 church related institutions of higher education.

/2 Originally, five such institutions were parties. However, by virtue of a compromise, the appeal as to Western Maryland College has been dismissed.

A three judge district court was convened below pursuant to 28 U.S.C. §§2281 and 2284. Following extended trial, briefs and oral argument, the lower court, by a 2-1 decision, upheld the constitutionality of the Act, as amended. Judgment was entered accordingly, and this appeal is taken therefrom.

During the pendency of the litigation below, most funds designated for the appellees were held in escrow. A.37, n.2. By amendment to §67 of the Act effective July 1, 1973, the formula by which the amount of aid was computed was amended to include an allotment of aid based upon graduate degrees awarded. A.56. Upon learning of the State's intent to pay two defendants that portion of their aid allotment based upon graduate degrees, appellants moved for a preliminary injunction against such payment. App. 16. The motion was denied for lack of jurisdiction. App. 18.

Following judgment against appellants, a motion for injunction pending appeal was filed with the district court, and was denied. Rec. 1741, 1811. Thereafter, an application for injunction pending appeal was filed with Chief Justice Burger. On November 25, 1974, the application was denied by a 5-3 vote of this Court.

The Challenged Legislation

The challenged legislation "provides public aid in the form of non-categorical grants" to private colleges and universities in the State. A.2. As originally passed the Act contained no restrictions as to use of the aid. The lower court held this form of legislation unconstitutional. A.23. During the pendency of litigation, §68A of the Act was promulgated, proscribing the use of aid "for sectarian purposes". A.54.

Notwithstanding §68A, there is no restriction against use of the aid to pay the salaries of teachers. R.1519-1523. There is no restriction against use of the aid for scholarships, and at least one appellee has already used the aid for this purpose. R.1478-1480. In administering the Maryland program, the State makes no further inquiry as to use upon learning that aid is used for scholarships. R.1519-1523.

Also, there is no restriction against use of the aid for the maintenance and repair of buildings, nor is any attempt made to restrict use of the aid to the upkeep of facilities used exclusively for secular purposes. A.52-55. In fact, buildings are used for a variety of religious purposes. See A.39-40, 44, 46.

At the time of trial, no specific guidelines for use of aid had been issued by the State. R.1504-1509.

Nor had the State made any effort to ascertain how funds already paid to the church related appellees had been used. R.1501. Although the State requires recipients to adopt internal accounting and administrative procedures to control the use of aid, it does not review the adequacy of such procedures. R.1510-1511. Moreover, there are no reviews of class schedules or course descriptions to guard against sectarian use. R.1519-1523; see A.18.

Two levels of screening are employed in an effort to ascertain that State aid is not used for sectarian purposes. First is a determination as to the eligibility of applicants, who are ineligible if they award primarily theological or seminary degrees. A.47. Second is a determination of whether State aid has been improperly used. Ibid. This second level is implemented through affidavits by the college president that funds will not be and have not been improperly used. A.48. A usage description is furnished to the State following distribution of funds to determine whether the college's expenditure was sectarian in nature. Ibid. State audit is available, and the district court found this to be "quick and non-judgmental". Ibid.

The Appellee Institutions

The court below found that the appellee institutions were all

church related, and conformed closely to the colleges approved in Tilton v. Richardson, 403 U.S. 672 (1971). A.3, 4, 10, 11. At all appellees there is a practice of starting classes with prayer. A.39. Some instructors wear clerical garb, and some classrooms have religious symbols. A.40.

One appellee, Loyola College, attempts to recruit two members of a religious order to its faculty each year. A.41. Also, at the time of trial, Loyola had an affirmative policy of increasing Jesuit presence on campus from eleven to twenty over a five year period. R.1219-1220. The Court below found that two other appellees favor members of religious orders as faculty for budgetary reasons. A.41. The evidence plainly shows that religious reasons also were a basis for such preference. See pp. 64-66, infra.

Although the trial court found that students are admitted without regard to religion (A.44), the evidence plainly shows that each college's recruiting efforts were concentrated largely toward one religious group See pp. 66-69, infra. As the trial court found, "the religious affiliation of the college would be readily apparent to any prospective applicant who took the time to read the catalogue." A.43.

The district court found itself unable to characterize the manner

in which theology and religion are studied at these schools. A.46. "However, a department staffed mainly by clerics of the affiliated church and geared toward a limited array of the possible theology or religion courses affords a congenial means of furthering the secondary objective of fostering religious experience." Ibid. To avoid excessive entanglement the district court held that State aid could not support theology programs. A.13.

All but one of the appellee colleges have, or recently had, religious quotas for membership on the governing board. A.43. All appellee institutions are affiliated with the Catholic Church, and the great majority of students at each is Catholic. A.44. Religious exercises are held on each campus, though attendance is not required. Ibid. The chaplain at each college is a clergyman of the affiliated church. A.44-45. Moreover, all of the appellee institutions have as a secondary objective the encouragement of spiritual development of students. A.45.

One appellee, Mount Saint Mary's College, is a corporation which operates both an undergraduate college and a seminary for the preparation of candidates for the priesthood. R.862; PX 81, Art. I, p. 1 (R.710); PX 79, p. 13 (R.710). There are numerous sharings between the undergraduate college and seminary, including the same corporate board of trustees

(R.862), the same director of public relations, comptroller and librarian (R.864), the same faculty in substantial measure (R.867), the same faculty meetings (R.871), the same bank account (R.871), the same dining and laundry facilities (R.866), the same living quarters for undergraduate seminarians (R.867), and sometimes the same religious observances (R.865-866).

SUMMARY OF ARGUMENT

Appellants contend that the challenged legislation is unconstitutional, because it fosters an excessive government entanglement with religion or potential therefor, and its primary effect advances religion.

Excessive Entanglement

The considerations relevant to determining whether a particular aid program fosters excessive government entanglement with religion are the character and purposes of the institutions benefited, the nature of the aid, and the resulting relationship between government and the religious authority. Tilton v. Richardson, 403 U.S. 672, 678 (1971). The nature of the aid and resulting church-state relationships or potential therefor under the Maryland aid program offer vivid contrasts to the program upheld in Tilton, and render the Act unconstitutional.

Aid to church related institutions of higher education can be sustained only for carefully limited forms of secular, neutral or nonideological

services, facilities or materials, such as construction grants. However, the Maryland aid is virtually unlimited in scope. As Judge Bryan succinctly stated in dissent below:

> "Of telling decisiveness here is the payment of the grants directly to the colleges unmarked in purpose ...." A.29. (Emphasis added.)

If the virtually unlimited form of aid upheld below is constitutionally permissible, then contrary to this Court's consistent holdings since 1971, the nature of aid as a criterion in any entanglement analysis becomes meaningless.

In order to guarantee that Maryland aid is not used for sectarian purposes, continuous and pervasive analyses of the schools' usage of aid will be required; and it is doubtful that even such analyses can effectively protect against religious use. Moreover, such analyses of annual payments of aid are precisely the continuing type of relationship between government and church related institutions which this Court has consistently rejected.

In short, the nature of the aid and resulting church-state relationships necessarily foster an excessive government entanglement with religion or potential therefor. Therefore, the challenged legislation is a law respecting an establishment of religion and is unconstitutional.

Primary Effect

The primary effect of the challenged legislation is to advance religion in numerous respects. Contrary to the requirement stated in several of this Court's decisions, the State fails to effectively guarantee that aid is not used for religious purposes. Aid may be used for virtually unlimited purposes, including teacher salaries, scholarships and building maintenance and repair. The "greater governmental surveillance" required by Tilton, 403 U.S. at 688, as a check on salary aid simply does not exist under the Maryland program; and State inquiry is nonexistent as to ultimate use of scholarship funds and the uses of buildings maintained and repaired by State aid. Also, aid may be used to support classes in which there is a practice of prayer recitation.

Aid supports colleges which impose religious restrictions on faculty appointments in the sense that such colleges have affirmative policies or practices to recruit members of designated religious orders. Aid also supports colleges which impose de facto religious restrictions on student admissions in the sense that their recruiting efforts are concentrated primarily toward persons of a particular religion. Aid also supports colleges whose secondary objective is to encourage spiritual development and which require students to take a limited range of courses in theology

and doctrine taught primarily or exclusively by clerics of the affiliated church. Lastly, aid supports institutions which appellants contend are sectarian.

For these reasons the primary effect of the aid program is to advance religion; and the challenged legislation is an unconstitutional law respecting an establishment of religion.

Repayment of Aid

If the challenged legislation is held unconstitutional, the appellee institutions should be required to repay all aid not enjoined upon motions or application timely filed by appellants. Otherwise, to the extent aid has been paid, appellants are totally deprived of a remedy, and the establishment clause is seriously eroded.

ARGUMENT

The first and fourteenth amendments proscribe any law "respecting an establishment of religion ...". The broad scope of this proscription has been explained as follows:

> "Its authors did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead they commanded that there should be 'no law respecting an establishment of religion'. A law may be one 'respecting' the

> forbidden objective while falling short of its total realization .... A given law might not establish a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment." Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

A law may be one respecting an establishment of religion "even though it does not aid one religion more than another but merely benefits all religions alike". Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 771 (1973); accord, Abington School District v. Schempp, 374 U.S. 203, 220 (1963).

The state must strictly maintain an attitude of "neutrality", neither advancing nor inhibiting religion. Id. at 222; Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. at 788. Neutrality avoids sponsorship of religion, financial support of religion, and active involvement of the sovereign in religious activity, which are the three primary evils against which the establishment clause is intended to protect. Tilton v. Richardson, 403 U.S. 672, 677 (1971).

To survive this establishment clause challenge, the Act must

satisfy three criteria:

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, ...; finally, the statute must not foster 'an excessive government entanglement with religion.'" Lemon v. Kurtzman, 403 U.S. at 612-613.

Appellants contend that the Act is unconstitutional, because it fosters an excessive government entanglement with religion, and its "primary effect" advances religion. No challenge is offered as to its secular legislative purpose.

I. THE ACT IS UNCONSTITUTIONAL BECAUSE CONTINUING PAYMENTS OF UNDEFINED AID TO CHURCH RELATED INSTITUTIONS AND CONTINUING STATE ANALYSES REQUIRED TO GUARANTEE THAT AID IS NOT USED FOR RELIGIOUS PURPOSES NECESSARILY FOSTER EXCESSIVE GOVERNMENT ENTANGLEMENT WITH RELIGION OR THE POTENTIAL THEREFOR.

As early as 1948, this Court warned against excessive government involvement with religion. See McCollum v. Board of Education, 333 U.S. 203, 211-212 (1948). However, the definition and application of "entanglement" in recent church-state cases began in Walz v. Tax Commission, 397 U.S. 664 (1970),

where this Court upheld the constitutionality of tax exemptions for churches. In Walz Chief Justice Burger stated the principle of entanglement in this manner:

> "...[T]he questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards ...". Id. at 675. (Emphasis added.)

In his concurring opinion Justice Harlan echoed this warning against "programs, whose very nature is apt to entangle the state in details of administration and planning ...". Id. at 695.

Approximately one year after Walz, this Court was confronted with challenges to the constitutionality of Pennsylvania and Rhode Island statutes authorizing direct and indirect money subsidies to parochial elementary and secondary schools. Lemon v. Kurtzman, 403 U.S. 602 (1971). For the first time the Court stated the considerations

relevant to determining whether an aid program fostered excessive government entanglement with religion:

> "In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." Id. at 615; Tilton v. Richardson, 403 U.S. at 678. (Emphasis added.)

These considerations are discussed below.

A. Character and Purposes of the Institution

1. Lemon v. Kurtzman

At issue in Lemon were statutes authorizing aid to church related elementary and secondary schools in Pennsylvania and elementary schools in Rhode Island. The Pennsylvania statute was reviewed upon dismissal of the complaint for failure to state a claim for relief. 403 U.S. at 620. Therefore, the allegations of the complaint as to the sectarian character and purposes of the schools were accepted as true, and no findings as to their character were made. Ibid.

However, detailed findings were made as to the character and purposes of the Rhode Island schools. In concluding that these schools involved "substantial religious activity and purpose", the Court relied upon specified religious characteristics. These included proximity of schools to parish churches, religious instruction, religious symbols in buildings, religiously oriented extracurricular activities, and the presence of dedicated members of religious orders. Id. at 615-616. Their importance was enhanced "by the impressionable age of the pupils ...". Id. at 616.

2. Tilton v. Richardson

At issue in Tilton was a federal statute authorizing grants and loans to private colleges and universities, including church related institutions, for the construction of academic facilities. As in Lemon consideration of whether the aid program fostered excessive government entanglement with religion required analysis of the character and purposes of the institutions.

The Court noted that "appellants themselves do not contend that these four institutions are 'sectarian'." Tilton v. Richardson, 403 U.S. at 685. A distinction was then drawn between "the religious aspects of church related institutions

of higher learning and parochial elementary and secondary schools." Ibid. At pre-college schools an affirmative policy is to assure future adherents to a particular faith. Id. at 685-686. At colleges, however, "students are less impressionable and less susceptible to religious indoctrination." Id. at 686. Moreover, the very nature of college courses and a high degree of academic freedom tend to limit sectarian influence. Ibid.

The Court then addressed the particular institutions at issue, and held that the record "would not support a conclusion that any ... departed from this general pattern." Ibid. None restricted faculty appointments or student admissions to members of the sponsoring religious order. Id. at 686. None required attendance at religious functions. Ibid. The parties stipulated that theology was taught academically. Ibid. Principles of academic freedom were maintained. Id. at 687. Therefore, contrary to Lemon, the Tilton institutions did not have "substantial religious activity or purpose".

3. The appellee institutions

The district court found that the appellee institutions conformed closely to the colleges approved in Tilton. A.10-11. The Court also found that "one secondary

objective" of all appellee institutions was "to encourage spiritual development of the students", and that "some of the defendants seem more caught up in this idea than others ...". A.45. However, the extent to which particular appellees are "caught up in this idea" was not detailed. Such detail is particularly important, because the more religiosity that pervades the institutions, the greater the risk that government aid will support religious activities and the greater the necessity for intensive government surveillance. See Tilton v. Richardson, 403 U.S. at 687.

Although the appellee institutions have certain characteristics of the Tilton schools, they also have characteristics of the Lemon schools. At the least they have substantial religious activity or purpose. Facts demonstrating the extent and intensity of religiosity at these institutions are offered throughout this brief, the "Appendix To Plaintiffs' Brief" filed below (Rec.1473), and plaintiffs' proposed findings of fact (Rec. 961-1011).

A number of distinctions between the Tilton institutions, as reflected in this Court's opinion, and the appelee institutions should be emphasized. Three institutions here have a policy or practice of favoring members of the sponsoring religion for certain faculty appointments. See pp. 64-66, infra. The recruiting practices of the colleges here, by encouraging applications from Catholic students, limit entry in large measure to Catholic students. See pp. 66-69, infra. The daily opportunities for worship on campus offered by the colleges here are limited to Roman Catholic religious services. And contrary to the stipulated academic teaching of theology in Tilton, the theology courses here are either admittedly taught for religious purposes (see pp. 70-73, infra), or are potentially taught in a religious manner. A.42, 45-46, 49-50.

Even absent these distinctions the nature of the aid and resulting church-state relationships or potential therefor under the Maryland program offer vivid contrasts to the program upheld in Tilton, and render the Act unconstitutional. A fortiori the presence of these distinctions, as well as substantial evidence that the advancement of religion is a substantial purpose and activity of the appellee institutions, cogently demonstrates

the existence of substantial risk that government aid will support religious activities. Correspondingly the necessity for intensive government surveillance is increased, as is the spectre of entanglement.

B. Nature of Aid

The majority opinion below dismissed any distinctions between the narrowly limited construction grants in Tilton and the virtually unlimited, undefined aid under the Maryland program as constitutionally insignificant. A.17. If aid in the virtually unlimited form upheld below is constitutionally insignificant, then the nature of aid as a criterion in any entanglement analysis becomes meaningless; and this Court's careful development of this criterion in Lemon, Tilton and succeeding cases is effectively nullified.

Lemon, Tilton and succeeding cases drew a sharp distinction between aid which by its nature is "religiously neutral" and aid which potentially fosters religion. In programs benefiting church related schools, aid which is religiously neutral is permissible under certain circumstances. Aid which potentially fosters religion is not. The forms of aid considered by the Court in Lemon and Tilton are reviewed below and then compared with the Maryland aid.

1. Lemon v. Kurtzman - teacher salaries

The forms of aid under the two statutes at issue in Lemon were similar. The Rhode Island statute authorized periodic payments directly to teachers in church related elementary schools of a supplement of 15% of their annual salary. 403 U.S. at 607. The Pennsylvania statute authorized periodic reimbursement directly to church related elementary and high schools for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects. Id. at 606-607.

In analyzing the teacher salary supplements under the Rhode Island statute, the Court first recounted forms of aid which had been upheld in earlier cases:

> "Our decisions from Everson to Allen have permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause. We note that the dissenters in Allen seemed chiefly concerned with the

pragmatic difficulties involved in ensuring the truly secular content of the textbooks provided at state expense." Id. at 616-617. (Emphasis added.)

The Court then vividly distinguished these earlier forms of aid from the teacher salary supplements:

> "In Allen the Court refused to make assumptions, on a meager record, about the religious content of the textbooks that the State would be asked to provide. We cannot, however, refuse here to recognize that teachers have a substantially different ideological character from books. In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not. We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of precollege education. The conflict of functions inheres in the situation. Id. at 617. (Emphasis added.)

The Court's emphasis on "potential" fostering of religion in the context of teacher salaries is especially

significant in light of three factors. First, the district court had found "that concern for religious values did not inevitably or necessarily intrude into the content of secular subjects...". Id. at 616. However, this Court discounted this finding, and stated that "what has been recounted suggests the potential if not actual hazards of this form of state aid." Id. at 618. (Emphasis added.)

Second, the lower court refused to assume "that parochial school teachers will be unsuccessful in their attempts to segregate their religious beliefs from their secular educational responsibilities." Id. at 619. However, this, too, was discounted, the Court reiterating that "the potential for impermissible fostering of religion is present". Ibid. (Emphasis added.)

Third, aid under both of the challenged statutes was limited to courses whose content inherently protected against the introduction of religious matter. The Rhode Island aid was limited to teachers who taught "only those subjects that are offered in the State's public schools" and who agreed not to teach a course in religion so long as they received salary supplements. Id. at 608. The Pennsylvania statute permitted reimbursement solely to teachers

in mathematics, modern foreign languages (excluding Latin, Hebrew and classical Greek), physical science and physical education. Id. at 610. It excluded reimbursement for "any subject matter expressing religious teaching, or the morals or forms of worship of any sect." Id. at 621. However, such safeguards were insufficient to overcome the "potential" for fostering religion.

In short aid such as bus transportation, school lunches, public health services and secular textbooks is regarded by the Court as religiously neutral without significant potential to foster religion. These forms of aid sharply contrast with teacher salary supplements, because teachers do have the potential for involving faith or morals in secular subjects. The permitted forms contrast even more sharply with the Maryland aid, which may be used for teacher salaries among a wide range of other expenses of church related institutions. See pp. 30-33, infra.

2. Tilton v. Richardson - construction grants

The Lemon distinction between aid which is religiously neutral and aid which potentially fosters religion was explicitly applied to the federal legislation challenged

in Tilton. There one-time, single purpose grants and loans were authorized to institutions of higher education for the construction of academic facilities. 403 U.S. at 675, 688. Such facilities could be used only for "defined secular purposes". Id. at 679. Excluded were facilities used for sectarian instruction, religious worship or primarily in connection with any divinity program. Id. at 675.

The actual facilities at issue in Tilton were secular in nature, including two libraries, a language laboratory, a science building, and a music, drama and arts building. Id. at 681. The evidence showed "that there are no religious symbols and that they had been used solely for nonreligious purposes." Id. at 680.

The Court sharply distinguished the construction grants permitted in Tilton from the teacher salary supplements rejected in Lemon in the following manner:

> "The entanglement between church and state is also lessened here by the nonideological character of the aid that the Government provides. Our cases from Everson to Allen have permitted church-related schools to receive

government aid in the form of secular, neutral, or nonideological services, facilities, or materials that are supplied to all students regardless of the affiliation of the school that they attend. In Lemon and DiCenso, however, the state programs subsidized teachers, either directly or indirectly. Since teachers are not necessarily religiously neutral, greater governmental surveillance would be required to guarantee that state salary aid would not in fact subsidize religious instruction. There we found the resulting entanglement excessive. Here, on the other hand, the Government provides facilities that are themselves religiously neutral. The risks of Government aid to religion and the corresponding need for surveillance are therefore reduced." Tilton v. Richardson, 403 U.S. at 687-688. (Emphasis added.)

The limited scope of permissible aid to church related schools has been reaffirmed in the following manner:

> "[S]ectarian schools perform secular, educative functions as well as religious functions, and ... some forms of aid may be channelled to the secular .... But the channel

> is a narrow one ...". Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. at 775. (Emphasis added.)

Referring to Tilton, this Court in Nyquist stated that "carefully limited construction grants to colleges and universities could be sustained ...". Id. at 776. (Emphasis added.)

Similarly, in Hunt v. McNair, 413 U.S. 734 (1973), this Court, in upholding a South Carolina program establishing a state "Authority" to raise construction funds from private sources for colleges, noted that the State contributed neither funds nor credit to the program. Id. at 737. The state did not even pay the expenses of the Authority. Id. at 738. Even though no state funds were involved, the private funds raised had use restrictions similar in substance to the Tilton restrictions. See Hunt v. McNair, supra at 736-737. In the absence of evidence to the contrary, the Court assumed that proposed financing related only to a "properly delimited project." Id. at 744.

In short, aid to church related institutions of higher education can be sustained only in the form of secular, neutral or nonideological services, facilities or materials,

such as carefully limited construction grants. It is against this standard that the Maryland aid must be considered.

3. Maryland aid - undefined in scope

The Maryland aid is paid directly to church related and other institutions of higher education. A.52. Each institution determines for itself how its share will be used. R.1582-1583. There are no restrictions as to use of the aid, except use "for sectarian purposes" is proscribed. A.54. This proscription first took effect on July 1, 1972, and was not applicable during the first year that the Act was in force.

The Maryland aid may be used to pay the salaries of teachers, including those of clergy teaching theology. R.1520-1522. A fortiori it may be used to pay the salaries of clergy teaching courses other than theology. In fact a substantial number of clergy do teach courses other than theology. PX 2, pp. 11-21 (R.49); PX 56, pp. 87-91 (R.411); DXM-2, pp. 107-112 (R.735); PX 121, pp. 147-153 (R.1132). It may also be used to pay the salaries of teachers of philosophy taught "in a specifically Catholic context". See DXM-2, p. 77 (R.735); R.1519-1523.

The potential for impermissible fostering of religion is aggravated by the circumstance that at all the appellee institutions the chaplain doubles as a teacher. PX 2, pp. 17, 19 (R.49) (Saint Joseph); R.532 (Notre Dame); DXM-2, pp. 106, 110 (R.735) (Mount Saint Mary's); PX 121, p. 147 (R.1132) (Loyola). This and the other circumstances described above demonstrate that even if the Maryland aid concerned only teacher salaries, it would be far broader than the statutes struck down in Lemon where aid was restricted to secular subjects. In fact aid under the Act has already been used for teacher salaries and related expenses. E.g., JX 44 (R.317); R.1001-1002.

This Court's deeply held misgivings against aid to teachers in church related schools was cogently reasserted in Levitt v. Committee for Public Education and Religious Liberty, 413 U.S. 472 (1973). In Levitt, the Court held that aid in the form of reimbursement to teachers for merely administering tests in church related schools was an unconstitutional establishment of religion. The payment of state aid to clerics who are teachers strikes directly at the root of the establishment clause:

> "The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property

> aroused their ... [colonial fathers'] ... indignation. It was these feelings which found expression in the First Amendment." Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. at 777, n. 33. (Emphasis added.)

Of course, the Maryland aid is not limited to teacher salaries. It is virtually undefined in scope. For example, there is no restriction in the Act against the use of aid for scholarships, although the scholarship program of at least one appellee is based in part upon religious considerations. See p. 53, infra. Also, there is no restriction against the use of aid for maintenance and repair of buildings or utilities therefor. See pp. 53-55, infra. This absence of restriction prevails although campus buildings sometimes contain chapels, religious symbols and clerics' living quarters, and are used for prayer. A.39-40; PX 21, pp. 104-105 (R.49); R.101, 475, 478, 591-592, 666, 752-753, 841, 898, 1137, 1240; PX 117, ¶21, pp. 18-19 (R.710); PX 146, ¶21, pp. 21-22 (R.1132). In fact aid has already been used for the maintenance and repair of such buildings. JX 44 (R.317); R.665-667.

In short, the Maryland aid is diametrically opposed to the carefully limited, "religiously

neutral" construction grants upheld in Tilton. It is obviously broader than the aid program recently upheld in Hunt v. McNair, supra, which did not involve any payment of state funds to church related institutions and involved even fewer church-state contacts than Tilton. Cf. Cecrle v. Ill. Educ. Facil. Auth., 52 Ill. 2d 312, 288 N.E. 2d 399 (1972); Clayton v. Kervick, 59 N.J. 583, 285 A. 2d 11 (1971). Maryland aid to church related institutions may be used for a virtually unlimited and undefined variety of purposes. As Senior Circuit Judge Bryan noted in dissent below:

> "Of telling decisiveness here is the payment of the grants directly to the colleges unmarked in purpose ....
>
> Presently the Act is simply a blunderbuss discharge of public funds to a church-affiliated or church-related college .... Research discloses to me no comparable carte blanche power of expenditure permissibly conferred by a state upon church-affiliated or church-related institutions." A.29-30.

It is in this context that the resulting relationship between church and state must be considered.

C. Resulting Relationship - Comprehensive and Continuing

1. Duty of state to guarantee that aid not used for religious purposes

In aid programs involving both church related and non-church related institutions, the state must guarantee that the aid does not advance religion. This requirement was expressed in Lemon as follows:

> "The Rhode Island legislature has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion...". 403 U.S. at 619.

In Tilton the absence of such a guarantee was the basis for the Court's invalidating a section of the challenged legislation on its face. 403 U.S. at 682-683. The Court confirmed that the government must ensure against use of aid for religious purposes:

> "...[W]e do perceive an aspect in which the statute's enforcement provisions are inadequate to ensure that the impact of the federal aid will not

> advance religion." 403 U.S. at 682. (Emphasis added.)

Similarly, in Committee for Public Education and Religious Liberty v. Nyquist, supra, the Court held:

> "In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid." 413 U.S. at 780. (Emphasis added.)

It is, therefore, clear that effective state guarantees against use of government aid for religious purposes are a sine qua non to the constitutionality of any government aid program involving church related schools.

2. Invalidity of guarantees involving comprehensive and continuing contacts between government and church related institutions

In Lemon, the Court described the restrictions against religious use in the Rhode Island program and their enforcement, as follows:

> "To ensure that no trespass occurs, the State has therefore

carefully conditioned its aid with pervasive restrictions. An eligible recipient must teach only those courses that are offered in the public schools and use only those texts and materials that are found in the public schools. In addition the teacher must not engage in teaching any course in religion.

> A comprehensive discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church." 403 U.S. at 619. (Emphasis added.)

Beyond the required surveillance the Rhode Island statute required the state under certain circumstances to examine the school's records to ascertain how much of its total expenditures were attributable to secular vis a vis religious activity./3 The Court held:

/3 The district court found only
*[footnote cont. next page]

> "This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids .... [W]e cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses." Id. at 620. (Emphasis added.)

Similarly, the Pennsylvania statute considered in Lemon was invalidated, because "the very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between church and state". Id. at 620-621. Moreover, Pennsylvania required recipient schools to maintain accounting procedures sufficient to identify the cost of secular educational services. Id. at 609-610. These accounts were subject to state audit. Id. at 610. The Court held that this power "to inspect and evaluate a church related school's financial records and to determine which expenditures are religious and which are secular creates an

/3* one instance where such an examination was necessary and found it unlikely that such determinations would be generally necessary. 403 U.S. at 608, n. 2.

intimate and continuing relationship between church and state." Id. at 621-622; accord; Johnson v. Sanders, 319 F. Supp. 421 (D. Conn. 1970), aff'd 403 U.S. 955 (1971).

The Tilton statute escaped invalidation, because the character of the institutions and the nature of the aid resulted in a minimal relationship between church and state. The Court stressed:

> "[U]nlike the direct and continuing payments under the Pennsylvania program, and all the incidents of regulation and surveillance, the Government aid here is a one-time, single-purpose construction grant. There are no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution's expenditures on secular as distinguished from religious activities. Inspection as to use is a minimal contact." 403 U.S. at 688. (Emphasis added.)

In short, aid to church related institutions may be upheld if the resulting relationship involves only minimal rather than comprehensive contacts, and does not involve continuing regulation or surveillance, continuing financial relationships or dependencies, continuing audits or the possibility thereof, or continuing government analysis

of an institution's expenditures on secular as opposed to religious activities. With this in mind, enforcement under the Maryland legislation is considered.

3. Comprehensive and continuing church-state contacts under the Maryland aid program

The enforcement and administration of the challenged legislation necessarily involve a comprehensive and continuing relationship between church related institutions and the State of Maryland.

The Act itself calls for direct and continuing payments to the institutions on an annual basis. A.52. The State continuously regulates the church related institutions by requiring on an annual basis (i) prior verification that aid will not be used for sectarian purposes, and (ii) post receipt verification that aid has not been so used, including necessary "follow up" by the State. A.48; See R.1532-1533.

The State analyzes the institutions' use of aid on an annual basis to determine whether such use was secular or sectarian. A.48. These analyses are based upon a usage description furnished by the institutions. Ibid. Also, the institutions are subject to annual audit. Ibid.

The foregoing alone constitute

precisely the continuing regulation, financial dependencies, audits and governmental analysis of expenditures of church related institutions which this Court has rejected. Lemon v. Kurtzman, supra; see Tilton v. Richardson, 403 U.S. at 688. However, the Maryland program suffers from even greater defects.

The State collects a wide variety of information annually from church related and other institutions receiving aid under the Act. The information is collected through a series of reports furnished by the institutions. The report forms call for the institutions to furnish a wide range of details including the following: degree program names; levels of degrees or awards and taxonomy codes; numbers of part-time and full-time students in each year in each major; description of the institutions; current funds, revenues and expenditures; indebtedness on physical plant, and endowment by book and market value; library collection, staff, operating expenditures and physical facilities; advanced degree students; degrees awarded; and inventory of physical facilities, including breakdowns based upon square footage and types of rooms (classrooms, office, laboratories, etc.). R.1529-1530, 1567, 1574-1576; PX 9, 10, 11 and 12 (R.49).

Although the foregoing information

would be collected even if there were no aid program, the information is used or available for use in connection with the administration of the Act. See R.1526-1527, 1529-1531, 1572-1576. For example, information as to theological degrees awarded may be used to ascertain whether an institution has requested aid based upon any such degrees. R.1572-1576. Information as to admissions criteria may be used to ascertain whether any religious criteria are included. R.1576. Also, the comprehensive information generally would reflect a change in emphasis of an institution as to programs and the use of physical facilities. R.1526-1527, 1529-1531. Such church-state contacts are entangling and proscribed.

There are further defects. In order for the State to effectively guarantee that teachers refrain from fostering religion in class, comprehensive surveillance would be required. Tilton v. Richardson, 403 U.S. at 687-688. In order for the State to ascertain that aid used for building maintenance and repair excludes the maintenance and repair of chapels, religious symbols and clerics' living quarters, detailed accounting restrictions and audits would be required. See pp. 53-55, infra. And in order for the State to ascertain that aid used for scholarships was not ultimately used for religious purposes, the State would have to

impose additional accounting and audit controls. See pp. 51-53, infra.

The majority below concluded that the church-state relationship under the Maryland aid program is not entangling. A.17. In so concluding, the majority below relied upon Hunt v. McNair, and stated that the church-state relationship there was far more pervasive than any likely to result from the challenged legislation. A.20-21. This view fails to recognize the South Carolina Supreme Court's "narrow interpretation of the practical operation" of the powers which may have given rise to entanglement. Hunt v. McNair, 413 U.S. at 748. Moreover, no public payments whatsoever were made to aid recipients in Hunt (Id. at 737);and, therefore, enforcement required only minimal church-state contact. Also, the powers in Hunt which may have given rise to entanglement were catalyzed only in the event of default by a recipient institution, and in such event a foreclosure proceeding which did not involve entanglement could be employed. Id. at 748-749. Therefore, the majority's reliance upon the Hunt program to uphold the Maryland program was misplaced.

As demonstrated above in no sense does the challenged legislation represent the type of narrow and limited relationship between church and state upheld in Tilton or Hunt. The relationship here is at least as entangling as that rejected in Lemon. At the least

the potential for entanglement is real and inescapable. As Judge Bryan stated in his dissent below:

> "Potentiality is also an assaying factor in measuring whether the Act's play within the colleges creates 'an excessive government entanglement with religion' .... Instantly the possibility is real and manifold. This is attributable to the complete absence of any appointment of the objects of the Act's bounty when extended to church-affiliated or church-related entities. In this context, to be assured that none of the public funds kindle or fire religion and theology, a closer oversight is required of the appropriation and application of the grants than in secular schools. Thus unavoidably the State is drawn into frequent and constant touch with the fiscal affairs of each college." A.32-33. (Emphasis added.)

D. The Tilton Entanglement Perspective Summarized

In its entanglement analysis in Tilton, the Court distinguished Lemon, because "three factors substantially diminish the extent and the potential danger of the entanglement." 403 U.S. at 685. First, religious indoctrination was not a substantial purpose or activity of the defendant schools.

Id. at 687. Second, the aid provided for "facilities that are themselves religiously neutral." Id. at 688. Third, the aid was "a one-time,single purpose construction grant ... [with] ... no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution's expenditures on secular as distinguished from religious activities." Ibid.

The Court viewed as significant the cumulative impact of the foregoing factors, as opposed to any one factor:

> "No one of these three factors standing alone is necessarily controlling; cumulatively all of them shape a narrow and limited relationship with government which involves fewer and less significant contacts than the two state schemes before us in Lemon and DiCenso. The relationship therefore has less potential for realizing the substantive evils against which the Religion Clauses were intended to protect.
>
> We think that cumulatively these three factors also substantially lessen the potential for divisive religious fragmentation in the political arena." Ibid. (Emphasis added.)

Conspicuously absent from the Maryland aid program are at least two of the three factors which reduced the potential for both administrative and political entanglement in Tilton. First, the Maryland aid is in no way restricted to provide "facilities that are themselves religiously neutral." Aid assumes the form of direct payment of funds for a virtually unlimited variety of purposes. See pp. 30-33, supra.

Second, the Maryland aid is by no means "a one-time, single purpose construction grant". On the contrary, there are continuing financial relationships, because aid is distributed annually. Also, there are continuing governmental financial analyses of expenditures on secular as opposed to religious purposes. See pp. 39-43, supra.

In addition to actual or potential administrative entanglement, the absence of the two factors above has already led to "the potential for divisive religious fragmentation in the political arena." See Tilton v. Richardson, 403 U.S. at 688. Although this "is admittedly difficult to document," Ibid., at least one college president, who is a Jesuit priest, has already advocated aid to private colleges "in the political arena". SDX-4, p. 2 (R.1546).

At least one state court has warned against the dangers of political entanglement arising out of a college tuition supplement program far more limited in scope than the Maryland program. With all nine justices concurring, the Washington Supreme Court stated:

> "However, political entanglement is intrinsic in this program. Unlike the one-time, single purpose construction grants permitted in Tilton, the unrestricted monetary grants in the instant case are likely to result in a continuing financial dependency by the recipient schools upon the state. Greater and greater appropriations are likely to be demanded as costs increase each year, thus splitting the candidates and the electorate along religious lines." Weiss v. Bruno, 82 Wash. 2d 199, 230-1, 509 P. 2d 973 991 (1973) (dictum). (Emphasis added.)

The third factor, i.e. the absence of "religious indoctrination" as a substantial activity or purpose, is less clear here. The lower court found that religious indoctrination is not a substantial purpose or activity at the defendant colleges. A.42. However, the evidence plainly demonstrates that the advancement of religion, if not religious indoctrination, is a substantial

activity or purpose at each institution. See pp. 19-22, supra and 74-75, infra.

This is supported by the trial court's finding that all of the defendant institutions have a "secondary objective of fostering religious experience." A.46. This secondary objective, together with the substantial religious purpose and activity of the institutions, mandates intensive government surveillance with resulting entanglement between government and religion. Therefore, even the third factor which reduced the potential for entanglement in Tilton is absent from this case.

In order to uphold the Maryland aid program, this Court must effectively erode the importance of at least two of the factors relied upon by the plurality in Tilton in concluding that the potential for entanglement was reduced, the two factors being "religiously neutral facilities" and a "one-time, single purpose" grant. More basically, the broad and undefined nature of the Maryland aid bears no resemblance to the limited form of aid upheld in Tilton and is even broader than the aid struck down in Lemon. Upholding the Maryland program would seriously undermine this Court's persistent emphasis on nature of the aid as a critical

factor in determining whether there is excessive entanglement between church and state. For if a program as broad as Maryland's is valid, then the nature of the aid becomes meaningless as a criterion to decide any entanglement question.

Tilton concludes that an aid program involving both church and non-church related institutions must be limited in scope and avoid continuing and comprehensive church-state relationships, whether actual or potential. The Maryland program fails in both respects. This failure is aggravated by the substantial religious activity and purpose of the appellee institutions. Therefore, the challenged legislation is unconstitutional.

II. THE PRIMARY EFFECT OF THE MARYLAND AID PROGRAM IS TO ADVANCE RELIGION.

In order to survive this establishment clause challenge, the primary effect of the Maryland aid program must neither advance nor inhibit religion. Lemon v. Kurtzman, 403 U.S. at 612. The primary effect test has been explained as follows:

> "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive

> that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." Hunt v. McNair, 413 U.S. at 743.

The term "primary effect" applies to state aid which only potentially or partially advances religion. The Court has explained:

> "Any remaining question about the contours of the 'effect' criterion were resolved by the Court's decision in Tilton, in which the Court found the mere possibility that a federally-financed structure might be used for religious purposes 20 years hence was constitutionally unacceptable because the grant might 'in part have the effect of advancing religion'." Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. at 783, n. 39. (Emphasis added.)

The Maryland aid program has the "primary effect" of advancing religion in the following ways:

A. By its failure to guarantee that state aid will not be used to advance religion.

B. By its financial support of classes in which prayer is recited.

C. By its financial support of institutions which impose religious restrictions on faculty appointments and perpetuate de facto religious restrictions on student admissions.

D. By its financial support of institutions whose secondary objective is to encourage spiritual development and which require students to take a limited range of courses in theology and doctrine taught primarily or exclusively by clerics of the affiliated church.

E. By its financial support of sectarian institutions.

A. Failure To Guarantee That State Aid Will Not Be Used To Advance Religion

As discussed at pages 34-35, supra, the State has the duty to effectively guarantee that aid does not advance religion; and failure to do so invalidates the aid program. Notwithstanding the entangling relationship described at pages 39-43, supra, the Maryland aid program fails to guarantee that aid will not advance religion, at least in the following respects.

1. Teacher salaries

The Act does not proscribe

use of aid to pay teachers' salaries. A.52-55; see pp. 30-32, supra. Even if informed that aid were used to pay salaries of clergymen teaching theology, the State would not inquire as to the subject matter of the courses or the teachers' handling thereof. R.1519-1523. Nor would there be any State inquiry as to other courses whose teachers (clergy and non clergy) were financially supported by the State. Ibid. This absence of review plainly violates Tilton's mandate that "[s]ince teachers are not necessarily religiously neutral, greater governmental surveillance would be required to guarantee that state salary aid would not in fact subsidize religious instruction." 403 U.S. at 687-688.

2. Scholarships

The Act does not proscribe use of aid for scholarships. A.52-55. In fact, at least one defendant (Loyola College) has already used aid for this purpose. R.1478-1480. In administering the Act the State does not even inquire whether state aid used for scholarships is thereafter confined to secular purposes. R.1518-1519. Therefore, upon crediting students' tuition in the amount of their scholarships, schools are free to use funds without restriction.

Use of Maryland aid for scholarships

without ensuing use restrictions is basically the same as three separate aid programs on the pre-college level struck down by this Court. In Committee for Public Education and Religious Liberty v. Nyquist, supra, New York State authorized tuition reimbursement and tax benefits to the parents of nonpublic school children. 413 U.S. at 764. However, there was no effort to ensure that upon receipt by the schools the aid supported only secular functions. Id. at 783. Likewise, there is no effort to ensure that the Maryland aid, when ultimately received by the schools, is confined to secular purposes. The primary effect of the aid in Nyquist was to advance religion, and the program was unconstitutional. Id. at 780-785. The same result is warranted here.

It is noteworthy that in Nyquist, the state argued that the aid went to parents and not schools. Id. at 785-787, However, the funneling of funds indirectly to nonpublic schools through parents was held constitutionally insignificant. Ibid.; Id. at 786, n.40. Similar aid programs in Pennsylvania and Ohio were rejected in Sloan v. Lemon, 413 U.S. 825 (1973), and Wolman v. Essex, 409 U.S. 808 (1972), affirming Wolman v. Essex, 342 F. Supp. 399 (S.D. Ohio E.D. 1972).

Tilton clearly supports such a result. In Tilton the Court struck down that part of the aid

program which would have permitted the future unrestricted use of facilities at the end of twenty years. Id. at 683-684. A fortiori the present unrestricted use of scholarship funds by church related institutions violates the establishment clause.

There is a further defect in use of the Maryland aid for scholarships. At least one appellee (Notre Dame) maintains a scholarship program entitling any member of the sponsoring religious order and any Catholic parochial school teacher to scholarships in the form of tuition discounts. R. 413, 437, 524-525. By permitting aid to be used for scholarships without inquiry as to the nature of the scholarship program, the State permits perpetuation of a scholarship program based upon religious considerations. In this manner also the State fails to guarantee that aid is restricted to secular purposes.

3. Building maintenance and repair

The Act does not restrict aid used for the maintenance of buildings to buildings used exclusively for secular purposes. A.52-55. It is doubtful whether such restrictions could be enforced in the context of the appellee institutions because of their substantial religious

activities and purposes. Cf. Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. at 774. In any event the absence of restrictions on building maintenance here renders the Maryland aid program just as invalid as the New York precollege maintenance and repair program rejected in Nyquist. There the court emphasized:

> "No attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, nor do we think it possible within the context of these religion-oriented institutions to impose such restrictions. Nothing in the statute, for instance, bars a qualifying school from paying out of state funds the salary of employees who maintain the school chapel, or the cost of renovating classrooms in which religion is taught, or the cost of heating and lighting those same facilities. Absent appropriate restrictions on expenditures for these and similar purposes, it simply cannot be denied that this section has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools." Ibid. (Emphasis added.)

Similarly, no attempt under the Maryland program is made to restrict payments

to "facilities used exclusively for secular purposes".

Uncontradicted evidence demonstrates the widespread use of campus buildings for religious purposes, including prayer (A.39), religious services (A.44), religious symbols such as crucifixes (A.40) (PX 21, pp. 104-105; R.49) (R.478) (PX 117, ¶21, pp. 18-19; R.710) (PX 146, ¶21, pp. 21-22; R.1132), religious counseling (PX 23, pp. 1, 4, 6; R.49) (PX 114; R.710) (R.1240-1241), and other religious activities. E.g., (PX 1, p. 17; R.49) (R.752-753, 832-833) (PX 146, ¶20, pp. 19-21, R.1132). See pp. 69-74, infra. By comingling aid with general college operating funds, two appellees have already used aid for building maintenance and repair. See JX 44 (R.317); R.665-667; A.50.

"If the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair." Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. at 777. Because the challenged legislation permits maintenance and repair of buildings used for religious purposes, its primary effect is to advance religion.

4. Overall ineffectiveness of guarantees

Administration of the Act by

the State through trial vividly demonstrates the ineffectiveness of its guarantees. As of the time of trial no specific guidelines had been issued by the State as to use of aid. R.1504-1509. As of the time of trial, the State had made no effort to ascertain how funds already paid to the appellee institutions had been used. R.1501. Although the State requires recipient institutions to adopt internal accounting and administrative procedures to control the use of aid, it fails to attempt any review of the adequacy of such procedures. R.1510-1511.

Even the audit available to the State is ineffective. The lower court, apparently in an effort to find such audit not entangling, held it to be "quick and non-judgmental." A.48. If "non-judgmental" it is difficult to see how an auditor could "judge" whether an expenditure was for secular purposes. Yet if the auditor does make such judgment, the church-state entanglement is evident. Lemon v. Kurtzman, 403 U.S. at 620; Tilton v. Richardson, 403 U.S. at 688.

Moreover, there are no reviews of class schedules or course descriptions to guard against sectarian use. As stated at page 51, supra, even if informed that aid were to be used to pay clergymen teaching theology the State would fail to inquire as to the course subject matter

or the teacher's handling thereof. Nor would there by any inquiry as to the handling of other courses. R.1519-1523.

The absence of such review here contrasts sharply with the on-site inspections in Tilton to enforce the statutory restrictions. 403 U.S. at 675. Such inspections included analyses of class schedules and course descriptions to ascertain that no sectarian instruction would be offered in federally supported areas. 403 U.S. at 650 (Brennan, J., dissenting).

The foregoing further demonstrates the absence of effective guarantees against religious use, which invalidates the Act as a law respecting the establishment of religion.

B. Financial Support of Classes In Which Prayer Is Regularly Recited

Plaintiffs submit that the financial support of class programs in which prayer is regularly recited is an unconstitutional establishment of religion.

1. Classroom prayer at appellee institutions

The lower court found that "there is a practice at ... [four] ... of the defendants of starting classes with prayer." A.39. The

extent of prayer ranges from approximately 6% at Mount Saint Mary's College (Pl. Ex. 117B; R.710) to a majority at St. Joseph College. A.40. The recitation of prayer is treated as a facet of each instructor's academic freedom. A.39. There is no effort by the State to prohibit classroom prayer or to condition aid to teachers upon such a prohibition. See A.52-55; R.1519-1523.

The religiosity of classes in which prayer is recited is often augmented by the presence of religious symbols and clerics in religious garb as teachers. See A.40. Prayer is recited in a wide variety of classes. These include education, language, mathematics, physical and social science, and theology. PX 20 (R.49); PX 73B (R.411); PX 117B, ¶¶ 2 & 3, pp. 13-16 (R.710); PX 148, ¶¶ 2-5, pp. 29-39 (R.1132).

2. Prayer and religious instruction excluded from public schools

The concept that public schools may not be constitutionally used for state sponsored prayer is beyond dispute. Engel v. Vitale, 370 U.S. 421 (1962). In Engel, a state sponsored prayer in public schools was challenged. The prayer was denominationally neutral.[4] As construed by the state courts, no pupil could be compelled to join

[4] "Almighty God, we acknowledge our dependence upon thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." 370 U.S. at 422.

in the prayer under the authorizing statute. Id. at 423-424. In unequivocally rejecting the statute's constitutionality, this Court stated:

> "The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say.... Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause ...". Id. at 429-430. (Emphasis added.)

This theme was reiterated one year later in Abington School District v. Schempp, 374 U.S. 203 (1963). In striking down bible reading and prayer in the public schools, the Court reaffirmed:

> "Our constitutional policy...does not deny the value or the necessity for religious training, teaching or observance.... But... it does deny that the state can undertake or sustain them in any form or degree." Id. at 218-219. (Emphasis added.)

The Court reiterated that the absence of compulsion upon students to join in prayer offered no defense to the charge of unconstitutionality under the Establishment Clause. Id. at 224-225; Committee For Public Education and Religious Liberty v. Nyquist, 413 U.S. at 786.

In reply to the argument that the religious exercises were minor in nature, the Court in Schempp stated:

> "Further, it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.'" 374 U.S. at 225. (Emphasis added.)

The de minimis nature of classroom prayer was also urged upon the court in De Spain v. DeKalb County Community School District, 384 F. 2d 836 (7th Cir. 1967), cert. den. 390 U.S. 906 (1968). The Court agreed that the prayer was de minimis, but refused to uphold the practice in the classroom lest the "trickling stream ... become a raging torrent." Id. at 840.

Engel and Schempp involved direct state "sponsorship" of prayer and bible reading by teachers paid with state funds. In Illinois ex rel McCollum v. Board of Education, 333 U.S. 203 (1948), the Court disapproved the mere use of public school classrooms by clergy for religious instruction on a voluntary basis. Cf. Zorach v. Clauson, 343 U.S. 306, 309, 315 (1952).

Engel, Schempp and McCollum, read together, mean that there may be neither state sponsored prayer nor religious instruction, whether or not state sponsored, in the public schools. Nor may the state permit such activity in its public colleges. See Epperson v. Arkansas, 393 U.S. 97, 106-107 (1968); Williams v. Eaton, 468 F. 2d 1079, 1083 (10th Cir. 1972).

3. Prayer and religious instruction excluded from publicly financed facilities or programs

Since the state may not sponsor prayer or permit religious instruction, whether or not state sponsored, in public colleges, it follows that the state may not finance prayer or religious instruction in private colleges. This was vividly demonstrated in Tilton. The statute challenged there expressly prohibited the use of federally aided facilities for religious

instruction, training or worship. 403 U.S. at 679-680. However, a limited enforcement period of twenty years would have opened the facility to such uses after the expiration of twenty years. Id. at 682.

Because the facility might be "used to promote religious interests" twenty years hence, the Court struck down the twenty year limitation period. Id. at 683. In short, the Court ruled that there may be no religious instruction, training or worship in publicly financed facilities at any time. Likewise, we submit, there may be no religious instruction, training or worship in publicly financed programs such as Maryland's.

Aid for classroom instruction is undeniably part of the Maryland program. R.1519-1523; see R.1582-1583; A.52-55. Since there is a practice of prayer in the classroom, the State, in effect, is financing religious worship. This is an establishment of religion. Although the trial judge found prayer to be "peripheral", A.40, the de minimis nature of any prayer is irrelevant under Schempp and DeSpain. See p. 60, supra. Even nondenominational prayers may not be sponsored by the state. Engel v. Vitale, supra.

The classroom prayer recitation here is aggravated by the strong

encouragement, if not requirement, of at least two appellees that students attend class. See PX 9, p. 23 (and supplement) (R.49); PX 63, p. 7 (R.411); cf. Anderson v. Laird, 466 F. 2d 283 (D.C. Cir. 1972) cert. den. 409 U.S. 1076 (1972) (military academies' requirement of chapel attendance unconstitutional). Because Maryland finances programs which include a practice of prayer, its aid program is a law respecting the establishment of religion.

C. Financial Support of Institutions Which Impose Religious Restrictions On Faculty Appointments And Perpetuate De Facto Religious Restrictions On Student Admissions

In Tilton the Court left open whether colleges' imposing religious restrictions on admissions would be eligible for aid. 403 U.S. at 682. The Tilton appellants had offered a profile of the typical sectarian institution of higher education, claiming that such an institution (i) imposed religious restrictions on admissions, (ii) required attendance at religious activities, (iii) compelled obedience to doctrines and dogmas of the faith, (iv) required instruction in theology and doctrine, and (v) did everything it could to propagate a particular religion. Ibid. The Court replied:

> "But appellants do not contend that these four institutions fall within this category. Individual

projects can be properly evaluated if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess these characteristics." Ibid.

Appellants submit that aid to an institution having any one of "these characteristics" is unconstitutional. Any other conclusion would permit obviously unacceptable results. For example, if all five characteristics had to be shown to invalidate a public aid program, an institution would be permitted to do everything possible to propagate a given religion, and still be entitled to receive aid as long as it did not have the other characteristics. Giving aid to an institution that did all it could to propagate a given religion would obviously offend the establishment clause. See Hunt v. McNair, 413 U.S. at 743.

The evidence in this case shows that at least three of these characteristics are present in varying degrees in the appellee institutions. Restrictions on faculty appointments and student admissions are discussed in this part "C". The requirement of theology and doctrine is discussed in "D" beginning at page 69, infra.

1. Religious restrictions on faculty appointments

Three appellees have the policy

or practice of at least partially restricting faculty appointments based on religion in the sense that they favor the hiring of some faculty upon a consideration of religion. Saint Joseph College regards it as a "first obligation" to have Catholic theology teachers; and all theology teachers have been Catholic for several years. PX 28, ¶12 (R.49); PX 21, pp. 71-72 (R.49). Also, the lower court found that budgetary considerations lead this college to favor the hiring of members of the sponsoring religious order in areas other than theology. See A.40-41.

The College of Notre Dame believes that Catholics are the most qualified to teach theology "in the Catholic tradition of Christianity". PX 72, ¶12, p. 10 (R.411). In fact all theology teachers are Catholic (two clergymen, two members of the sponsoring religious order and one layman). R.532-533. Also, the lower court found that budgetary considerations lead this college to favor the hiring of members of the sponsoring religious order in areas other than theology. See A.40-41.

At the time of trial, Loyola College had an affirmative policy of increasing the Jesuit presence on campus from eleven to twenty over a five year period. R.1219-1220. Also, this college was establishing a vigorous recruiting campaign designed to attract two Sisters of Mercy, a sponsoring religious order, to the

faculty each year. A.41; R.1228-1229. In recruiting faculty for its theology department, Loyola College looks first for Jesuit priests and Sisters of Mercy, and then to Roman Catholic laymen. PX 146, ¶12, pp. 9-11 (R.1132); R.1235, 1319. Also, the college attempts to maintain at least two Jesuits as faculty in the philosophy department. R.1406, 1408.

The foregoing demonstrates that at three appellee institutions a policy or practice of faculty appointments based in part on religion are in effect. To the extent that these appellees have a policy or practice favoring the hiring of faculty of one religious preference, they have the corollary policy or practice of restricting the hiring of faculty of other religious preferences. By permitting aid to such institutions, the Act is a law respecting the establishment of religion.

2. Perpetuation of de facto religious restrictions on student admissions

Four appellees have de facto religious restrictions on the admission of students, because their recruiting efforts are concentrated toward members of a particular religious faith. Although the trial court found that students are admitted without regard to religion (A.44), we submit that there exists a practice of concentrating recruiting efforts largely toward students of one faith, thereby perpetuating a religiously homogeneous student body.

Saint Joseph College has directed approximately fifty percent of its recruiting efforts toward Catholic high school students; and a large majority of the college's students graduated from Catholic parochial schools. R.157; PX 21, pp. 94-97 (R.49). Publications distributed to prospective students state that the college is Catholic and display religious symbols. E.g., PX 1, pp. 4-7, 15, 20, 44, 78 (R.49); PX 6, cover page (R.49). Application forms request the applicant's religious preference. PX 8 (R.49).

During the 1972-73 school year, the College of Notre Dame directed approximately one-third of its recruiting efforts toward Catholic high schools, and the balance toward public schools. R. 575, 586-587. Half or more entering freshmen in the 1971-72 and 1972-73 school years graduated from Catholic high schools. R.581-583. School Sisters and parochial school teachers who are admitted as students receive tuition discounts of 40%. R.436-437; 524-525.

More than half of the high schools at which Mount Saint Mary's College has recently recruited are Catholic parochial schools, and more than half of the high schools on the college's "selected mailing list" are Catholic parochial schools. R.1021-1022, 1027-1029. At the time of trial, the current recruiting brochure described the college as "the second oldest independent Catholic college in the country". PX 109, p. 4 (R.710); R. 1029. It

states "that education is enhanced by the Mount's Catholicism" and that the presence of priests is "felt and valued in every aspect of life at Mount Saint Mary's". PX 109, p. 4 (R.710). Prior recruiting brochures had similarly religious overtones. E.g., PX 92 and 93 (R.710). In recruiting students for 1972, each issue of "Briefing" a college information bulletin, was sent to the pastors of all Catholic churches in the dioceses of Baltimore, Washington and Harrisburg. PX 101, p. 7 (R.710).

The major "feeder" schools for Loyola College are Catholic high schools in the Baltimore metropolitan area; and the college continues to recruit at such schools. R.1296, 1323-1325. Loyola's reputation as a Catholic college, "which we are happy to recognize and admit ...", also draws Catholic applicants. R.1203-1204.

Moreover, as the trial court found, "for each defendant the religious affiliation of the college would be readily apparent to any prospective applicant who took the time to read the catalogue." A.43. The great majority of students at the appellee institutions are Catholic. A.44.

We submit that by perpetuating the predominance of one religious group through recruiting efforts directed in large part at a population comprised of that group, the above four institutions impose de facto restrictions on student

admissions. Analogous though distinguishable employment recruiting practices have been held unlawful under civil rights laws. E.g., United States v. Dillon Supply Company, 429 F. 2d 800, 803-804 (4th Cir. 1970); United States v. Georgia Power Company, 474 F. 2d 906, 911, 925 (5th Cir. 1973). Payment of state aid to institutions imposing de facto religious restrictions on student admissions is an establishment of religion, and should be enjoined. See Tilton v. Richardson, 403 U.S. at 682.

D. Financial Support of Institutions Whose Secondary Purpose is to Encourage Spiritual Development and Which Require Students to Take a Limited Range of Courses in Theology and Doctrine Taught Primarily or Exclusively by Clerics of the Affiliated Church

In Tilton the Court left open whether institutions which required instruction in theology and doctrine, at least where there is a danger of religious overtones, disqualified them from receiving aid. 403 U.S. at 682. As stated earlier this characteristic alone should be sufficient to bar an institution from the public treasury. See pp. 63-64, supra.

The appellee institutions all require students to take theology. A.45-46. At Saint Joseph College and Loyola College this requirement extends only to Catholic students.

PX 28, p. 21 (R.49); PX 146, p. 32 (R.1132). At College of Notre Dame and Mount Saint Mary's College, all students are required to take theology. R.453; DXM-2, pp. 41-42 (R.735). In addition, Mount Saint Mary's College requires all students to take nine hours of philosophy. Ibid.; see pp. 72-73, infra.

The lower court found that "the study of religion or theology may become an instrument for strengthening the students' religious life." A.49. This finding is based upon the schools' offering only a limited array of theology or religion courses, the staffing of departments primarily or exclusively with clerics, and the appellee institutions' "secondary objective of fostering religious experience." A.41, 42, 46. Moreover, the evidence fully supports the conclusion that theology courses at the above four institutions are at least in part permeated with religious as opposed to academic overtones, and are in fact an instrument for strengthening the students' religious life.

At Saint Joseph College the inculcation of religion is a goal of at least some theology courses. The chairman of this college's theology department testified that "our goal in the Theology Department would be to deepen their appreciation of Divine Revelation ...". PX 22, pp. 4-5 (R.49). Revelation holds "that God intervened in human history to save mankind in 1850 B.C.

We all practically hold that." PX 22, p. 6 (R.49). Similarly, the president of Saint Joseph College testified that "certainly in theology" students are made aware of the Fatherhood of God. PX 21, p. 15 (R.49); R.99. This is a belief in "a Supreme Being, who we call Father, who guides our destinies and in whom we put our trust". R.98.

One basic theology course offered at Saint Jospeh College is "just understanding of God or concept of God, our concept and the redemption of mankind by his Divine Son, and it's primarily the doctrine of God and of his Divine Son, the Holy Spirit, Blessed Trinity, principally that." PX 22, pp. 6-7 (R.49). Another basic theology course includes "the study of the Church and the study of the Sacraments principally. The Church is the continuation of Christ and the Sacraments of his redemptive activities." PX 22, p. 10 (R.49).

The foregoing clearly demonstrates that at Saint Joseph College, the purpose of at least the basic theology courses is religious, not academic; the course content is religious, not academic; and the courses are used to strengthen religious beliefs.

The president of College of Notre Dame testified that theology courses "deal with knowledge of eternal truths." PX 71A, p. 25 (R.411). For some people the concept of Christ as a divinity

would be an eternal truth. PX 71A, p. 26 (R.411). This would be taught "in some theology courses specifically aimed to teach the tenets of Catholicism." Ibid. The foregoing demonstrates that, at least in part, theology courses at Notre Dame have religious as contrasted with academic overtones.

The chairman of the theology department at Mount Saint Mary's College testified that in no case to his knowledge had any theology teacher taken a personal position contrary to the Roman Catholic Church. R.1058. This is hardly surprising, since, as the lower court found, all theology teachers are Roman Catholic priests. A.42. The absence of diverse opinions generated through such a homogeneous staff makes it probable that the study of religion or theology is an instrument for strengthening the students' religious life. See A.49.

Philosophy at Mount Saint Mary's College, of which nine hours are required of all students, also has deeply religious overtones. It is intended to provide the intellectual foundation for the student's effort to integrate the diverse contents of his liberal arts studies, and is pursued "in a specifically Catholic context .... first, as a body of questions directly related to man's religious experience; second, as a body of ideas characteristic of the intellectual and moral traditions of Catholicism." DXM-2, p. 77 (R.735); R.848-850. (Emphasis added.) The foregoing demonstrates that at Mount Saint Mary's College there is a cogent

probability that both theology and philosophy are used to strengthen students' religious beliefs.

The chairman of the theology department at Loyola College testified that there is no substantial difference between teaching religion to precollege students vis a vis college students. He stated:

> "... [I]n the teaching of Religion, let's say in the elementary school, already, and in high schools, there should be the same method as in the teaching of Theology, only on a lower level -- adapted to the pupils." R.1370.

On both the college and precollege levels, the purpose is to guide the student to a free decision, recognizing that Catholic theology is convinced that it is in conformity with "Holy Scripture". R.1373. Theology concerns itself with Man's "ultimate concern", described as follows:

> "According to me, that is being united with God and Jesus Christ, and Jesus Christ is God Man, so that it is human, human, human! That is my ultimate concern. Be a human being!" R.1381.

The probability that theology teachers will inculcate religion in courses addressed to man's "ultimate concern" is evident.

The requirement of theology is a characteristic which expressly concerned the Court in Tilton. 403 U.S. at 682. This requirement, especially in the deeply religious settings manifested in the theology departments of the appellee institutions, disqualifies them from receiving public funds.

E. Financial Support of Sectarian Institutions

This Court has suggested that an institution is "sectarian" when "religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission ...". Hunt v. McNair, 413 U.S. at 743. Although the term "sectarian" is a convenient epithet, the fundamental question in deciding whether an institution is sectarian is what criteria should be applied. Tilton, Lemon and certain state court cases offer substantial guidance.

Five of the relevant Tilton criteria are stated at page 63, supra. Also relevant under Tilton is whether "the inculcation of religious values ... [is] ... a substantial if not the dominant purpose of the institutions." 403 U.S. at 685. The relevant Lemon criteria are stated at page 18, supra.

In Horace Mann League v. Board of Public Works, 242 Md. 645, 672, cert denied, 385 U.S. 97 (1966), the Maryland Court of Appeals set forth six general criteria relevant in determining sectarianism: (i) the stated purposes of the college; (ii) the religious affiliations of the college personnel; (iii) the college's relationship with religious organizations and groups; (iv) the place of religion in the overall college program; (v) the result or outcome of the college program; and (vi) the work and image of the college in the community. These criteria have generally been used in at least two state cases following Horace Mann. See Weiss v. Bruno, 82 Wash. 2d 199, 509 P. 2d 973 (1973); State ex rel Warren v. Reuter, 44 Wis. 2d 201, 170 N.W. 2d 790 (1969).

Contrary to the lower court's finding that the appellee institutions are not "pervasively sectarian" (A.38), appellants submit that by applying the Tilton, Lemon and other criteria set forth above to the evidence in this case, the conclusion is warranted that all of them are sectarian. The facts relied upon for this contention are detailed in this brief, the "Appendix To Plaintiffs' Brief" filed below (Rec. 1473) and plaintiffs' proposed findings of fact (Rec. 961-1011).

III. IF THE CHALLENGED LEGISLATION IS UNCONSTITUTIONAL THE APPELLEE INSTITUTIONS SHOULD BE REQUIRED TO REFUND ALL PAYMENTS NOT ENJOINED UPON MOTIONS OR APPLICATION TIMELY FILED BY APPELLANTS.

As stated earlier most of the challenged aid for the appellees was

placed into an escrow account pending the litigation and judgment below. See p. 5, supra. When the State of Maryland expressed its intention to release funds computed with reference to graduate degrees, plaintiffs moved for a preliminary injunction, but the motion was denied. Ibid. Following judgment a motion and application for injunction against payment pending appeal were respectively filed with the lower court and this Court, and both were denied.

Appellants contend that if the Act is held unconstitutional, the appellee institutions should be required to refund all payments not enjoined upon timely filed motions or application. A similar issue was considered by the Court in Lemon v. Kurtzman (Lemon II),411 U.S. 192 (1973). Lemon II was the sequel to this Court's ruling in Lemon v. Kurtzman in 1971, invalidating Pennsylvania's aid program for private elementary and secondary schools. Prior to this Court's 1971 decision, Pennsylvania schools had performed services pursuant to the challenged legislation, but had not been paid for these services as of the time of this Court's ruling. The issue in Lemon II was whether such payment should be enjoined. This Court, by a 5-3 vote,with Justice Marshall not taking part, declined to enjoin payment.

In reaching this result the plurality stated that flexibility was needed in "adjusting and reconciling public and private needs." Id. at 198-200.

A number of factors were considered. First the appellants had abandoned their request for preliminary injunction. Id. at 196. Also, they had not moved for interlocutory relief pending appeal, even though schools were actively entering into contracts pursuant to the challenged legislation. Ibid. Also, they had failed to "indicate their intention to prevent reimbursement" for service previously furnished until after this Court's 1971 Lemon ruling. Id. at 197.

The plurality believed that the requested distribution "will not substantially undermine the constitutional interests at stake in Lemon I." Id. at 201. The schools' reliance to their detriment upon payment was also deemed significant. Id. at 203. Lastly, the plurality believed that state governments should not be subjected "to the peril of having their arrangements unraveled" if programs are implemented prior to a judicial determination as to their constitutionality. Id. at 207-208.

We submit that parallel considerations in this case mandate a different result than in Lemon II. First, appellants here made persistent efforts to prevent payment of the funds at issue. To the extent funds were not protected by an escrow arrangement, injunctive relief was requested, but denied. There was no abandonment or failure of any request for injunctive relief as in Lemon II.

Also contrary to the Lemon II appellants' failure to timely indicate their intention to prevent reimbursement for previously furnished services, appellants here consistently expressed their intention to request repayment of aid received. This intention was first expressed in the complaint (see App. 10), and later in briefs and oral arguments.

Also contrary to Lemon II, a failure to grant relief here would seriously undermine the constitutional interests at stake. The inevitable entanglement between the State and church related institutions generated by the institutions' use of funds can be effectively avoided only by repayment thereof. Moreover, unrecovered payments to ineligible institutions for at least three fiscal years would erode the "primary effect" doctrine to a far greater degree than contemplated in Lemon II, where the plurality stated: "that interest is implicated only once under special circumstances that will not recur." Id. at 202.

The reliance problem considered in Lemon II is more difficult to address, because, as the Court noted, "the determination of actual reliance would be subtle, premised largely on credibility and not on facts of record." Id. at 205, n. 6. However, as stated earlier, the absence in Lemon II of at least two factors which persuaded the plurality to give overriding weight to reliance interests are present here. First, injunctive relief was

timely requested here. Cf. Lemon II at 204-205. Second, appellants timely and consistently stated their intention to seek repayment. Cf. Lemon II at 205. Therefore, reliance interests in this case should not be permitted to outweigh the inevitable erosion of the establishment clause generated by failure to order a refund.

Although the plurality in Lemon II expressed reluctance to undermine the initiative of state legislators and executive officials, Id. at 207-208, it acknowledged:

> "This is not to say, of course, that the flexible range of federal injunctive powers should be curtailed so as to permit state officers to proceed with their business regardless of serious constitutional questions concerning state legislation. Indeed, a significant purpose of these tools is to preserve rights of all parties and to confine unnecessary harm during the often protracted pendency of constitutional litigation." Id. at 208, n.8.

The denials of appellants' requests for injunction were inconsistent with such purpose, because they failed to preserve appellants' rights under the first and fourteenth amendments pending this litigation. The only effective redress is to order repayment. Failure to do so would leave appellants totally without remedy as to public

funds paid to the appellee institutions during at least three fiscal years (1972-73, 1973-74, 1974-75). To that extent the first and fourteenth amendments mandate against governmental establishment of religion will have been severely eroded.

Moreover, the absence of any requirement to repay funds can only serve to encourage state governments, albeit in good faith, to enact laws of dubious constitutionality. Maryland is a striking case in point, having enacted the challenged legislation in the fact of a holding by the Maryland Court of Appeals five years earlier that a far more limited form of aid violated the establishment clause. Horace Mann League v. Board of Public Works, supra.

It is true that at the time of enactment, doubt had been cast upon the Horace Mann ruling by Tilton v. Richardson, 312 F. Supp 1191 (D. Conn. 1970). However, the knowledge that funds may be paid with impunity and not recovered, notwithstanding both prior adjudication casting grave doubt upon the constitutionality of authorizing legislation and vigorous efforts to enjoin payment and preserve the status quo pending litigation, can serve only to encourage the passage of dubious legislation. Unless repayment is ordered, appellants and others similarly situated have no effective remedy as to significant aid payments; and the Establishment Clause is severely undermined. Therefore, repayment should be ordered.

CONCLUSION

By reason of the foregoing, the challenged legislation constitutes a law respecting an establishment of religion, and should be declared unconstitutional on its face and as applied. Moreover, the Board of Public Works of the State of Maryland should be permanently enjoined from implementing said legislation; and the appellee institutions should be required to refund all payments made pursuant thereto not enjoined upon motions or application timely filed by appellants.

Respectfully submitted,

Lawrence S. Greenwald

Attorney for Appellants

Melvin L. Wulf
Of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 74-730

JOHN C. ROEMER, III, EDWARD E. DOERR, KENNETH A. STEVENS, AND CYNTHIA KOONCE MILLER, *Appellants*,

v.

BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND; MARVIN MANDEL, Governor; LOUIS L. GOLDSTEIN, Comptroller; JOHN A. LUETKEMEYER, Treasurer; COLLEGE OF NOTRE DAME; MOUNT SAINT MARY'S COLLEGE; SAINT JOSEPH COLLEGE; and THE ASSOCIATED PROFESSORS OF LOYOLA COLLEGE OF THE CITY OF BALTIMORE, INC., *Appellees*.

On Appeal from a Three Judge United States District Court for the District of Maryland

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BRIEF OF APPELLEES LOYOLA COLLEGE AND MOUNT SAINT MARY'S COLLEGE

OPINION BELOW

The opinion of the United States District Court for the District of Maryland in this case is reported at 387 F. Supp. 1282 (1974). It is reprinted in full beginning at page A-1 of the Appendix to the Jurisdictional Statement (J.S.).

JURISDICTION

The District Court entered judgment in this case on October 21, 1974. J.S., p. A-57. Notice of appeal was filed with the District Court on October 25, 1974. J.S., p. A-59. This Court noted probable jurisdiction on February 18, 1975. —— U.S. ——. The jurisdiction of this Court to hear this case on direct appeal rests on 28 U.S. § 1253.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

This appeal draws into question the constitutionality of Sections 65-69 of Article 77A of the Maryland Code, which is a program of public aid to private colleges and universities in Maryland. The statute, as originally enacted, is reprinted at pages 12 to 15 of the Joint Appendix (J.A.). The statute, as subsequently amended and in the form it existed at the time the District Court entered judgment, is reprinted at pages A-52 to A-54 of the Jurisdictional Statement.

QUESTIONS PRESENTED

1. Whether the Maryland college aid program challenged by the appellants has generated a primary effect that either advances or inhibits religion and thus violates the Establishment Clause of the First Amendment, as applied to the states through the Fourteenth Amendment.

2. Whether the administration of the Maryland college aid program results in excessive government entanglement with religion and thus violates the Establishment Clause of the First Amendment, as applied to the states through the Fourteenth Amendment.

3. Whether, if the Maryland college aid program is unconstitutional, the appellee colleges should be required to pay back the funds awarded and paid to them during a period when the program had been declared constitutional.

STATEMENT OF THE CASE

A. The Challenged Statute

In 1971, the Maryland General Assembly enacted a program of public aid to private colleges and universities in the state to help alleviate the growing financial problems shared by those schools with private institutions of higher learning throughout the nation. Md. Code, Art. 77A, § § 65-69. As the District Court noted in its opinion, the formula by which funds appropriated under the aid program have been allocated among private colleges and universities in the state has been

altered since the statute's enactment. J.S., pp. A-5 to A-6.[1] Throughout its existence however, the aid program has been designed to provide general purpose grants to institutions that meet statutory eligibility requirements. In 1972, at its first session following this Court's decision in *Tilton* v. *Richardson,* 403 U.S. 672 (1971), the Maryland General Assembly amended the statute to prohibit colleges receiving funds under the program from using those funds for "sectarian purposes." Md. Code, Art. 77A, § 68A.

To qualify for aid under the program, a college must (1) be nonprofit and accredited by the Maryland Department of Education, (2) have been in existence prior to July 1, 1970, (3) maintain one or more earned degree programs culminating in an associate in arts or baccalaureate degree, and (4) not award only seminarian or theological degrees. Md. Code, Art. 77A, § 66. The aid program is jointly administered by the appellee Board of Public Works and the Maryland Council for Higher Education ("Maryland Council"). Md. Code, Art. 77A, § 68. The Board of Public Works is the agency responsible for approving awards of state funds under the statute. The Maryland Council handles the routine administrative duties connected with the aid program.

The Maryland Council was created by statute and charged with the responsibility for the overall coordina-

[1] As originally enacted, the statute provided for an annual grant of $500 for each bachelor's degree and $200 for each associate in arts degree awarded by eligible colleges. J.A. 13. The statute was subsequently amended to provide that an institution's annual grant should be computed by multiplying the number of its full-time equivalent students by 15 percent of the amount appropriated for each full-time equivalent student attending four-year public colleges in Maryland. J.S., pp. A-53 to A-54.

tion of higher education in Maryland to assure an adequate allocation of educational resources. Md. Code, Art. 77A, §§ 28-32. While its statutory duties are defined specifically with reference to public higher education, the Maryland Council has collected extensive information about private colleges and universities in the state and has reported on the programs and practices of those institutions. As the court below noted, the Maryland Council has "developed considerable expertise as to the character and functions of the various private colleges and universities in the State, independent of its functions as administrator of this program." J.S., p. A-5.

The Maryland Council engages in a two-level screening process "to ensure that funds are not improperly used." J.S., p. A-17. The first level of screening involves an evaluation of applicant institutions to determine if they award principally theological or seminarian degrees, J.S., pp. A-17 to A-18, or if their educational programs are principally religious in nature. Tr. 1578-80, 1588-90.[2] Several institutions have been disqualified from receiving aid under that screening process. J.S., p. A-47.

The second level of screening involves a determination by the Maryland Council of whether funds paid to eligible colleges have been spent in violation of the statutory prohibition against "sectarian" use of those funds. At the time that a college applies for its annual grant, its president is required to verify under oath that the funds will not be used for sectarian purposes. At the end of the fiscal year in which a grant is re-

[2] Citations to "Tr." in this brief refer to the transcript of the trial in the District Court.

ceived, the college must submit a utilization-of-funds report detailing how the funds were spent. That report must be accompanied by an affidavit verifying that none of the expenditures were for sectarian purposes. J.S., pp. A-47 to A-48.

The verified reports submitted by the colleges showing how state funds were spent are the principal vehicles by which the Maryland Council assures compliance with the statutory prohibition against sectarian use of those funds. Tr. 1515-17. If the information contained in those reports is insufficient or incomplete, the Maryland Council will seek, and in the past has sought, additional information. Tr. 1611-16, 1617-22. The Maryland Council can also request that state auditors conduct an independent examination of an institution's expenditure of state funds if there is any doubt that the expenditure was solely for nonsectarian purposes. But, as the District Court noted, "[t]he usage verification and the normal accounting which each college conducts obviate the need for state post-audit analysis in every case." J.S., p. A-48.

A total of 18 private colleges and universities in Maryland have received grants under the aid program since its inception. J.S., p. A-37 n.2. The five colleges originally named as defendants in this action received approximately one-third of the total funds awarded under the program during the first two years of its operation. *Id.*

B. The Proceedings Below

The appellants, four taxpayers of the State of Maryland, filed their complaint on March 29, 1972, alleging that the aid program they challenged violated the Establishment Clause of the First Amendment, as ap-

plied to the states through the Due Process Clause of the Fourteenth Amendment. J.A. 6.[3] Named as defendants were the Board of Public Works, three state officials who comprise the Board of Public Works, and five colleges that had received state funds under the aid program.[4]

The complaint alleged that the defendant colleges were "sectarian educational institutions" at which religion and religious activities infused the total educational program. J.A. 7-8. The complaint further alleged that the statute authorizing the aid program was unconstitutional on its face and as applied because it permitted public funds to flow to institutions of that character. J.A. 6, 9. Appellants requested an injunction against future operation of the aid program and an order requiring the appellee colleges to repay grant funds paid to them. A district court of three judges was convened pursuant to 28 U.S.C. §§ 2281, 2284.

After the disposition of several pre-trial motions, the appellants engaged in extensive discovery. The trial commenced on May 29, 1973 and continued intermittently over several weeks, ending on June 26, 1973. The transcript of the trial is almost 2,000 pages in

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[3] The original plaintiffs included two organizations, and the complaint also alleged that the Maryland college aid program also violated the Free Exercise Clause of the First Amendment. In response to pre-trial motions filed by the appellants, the district court dismissed the organizational plaintiffs for lack of standing and the Free Exercise claim for failure to state a claim. *American Civil Liberties Union* v. *Board of Public Works*, 357 F. Supp. 877 (D. Md. 1972).

[4] Among the colleges originally named as defendants was Western Maryland College. After this Court noted probable jurisdiction, appellants filed a motion under Rule 60 of the Rules of this Court dismissing Western Maryland College as an appellee.

length and contains the testimony of the presidents and staff and faculty members of the appellee colleges, one expert witness on the teaching of religion in the undergraduate curriculum, and the staff member of the Maryland Council who administers the challenged aid program. In addition, the parties introduced several hundred documents into evidence.

At the conclusion of the trial, the parties submitted extensive proposed findings of fact and lengthy briefs on the legal questions presented. Following oral argument, the court below issued its decision on October 16, 1974, ruling that the challenged statute was constitutional and that payment of public funds to the appellee colleges did not offend the Establishment Clause. J.S., p. A-1. Circuit Judge Bryan dissented. J.S., p. A-26. The court also entered separate findings of fact to which all three judges subscribed. J.S., p. A-35.

Following the entry of judgment, appellants sought from the court below an injunction to prevent payment to the appellee colleges of funds awarded them under the aid program following the filing of the complaint but held in escrow pending the decision by the district court. The District Court denied the appellants' motion on November 15, 1974 and this Court denied a similar motion by an order entered on November 25, 1974.

C. The Decision Below

The court below found no merit in appellants' constitutional claims by applying the three-part Establishment Clause test of purpose, primary effect and entanglement that this Court's decisions have evolved over the past several years. See *Lemon* v. *Kurtzman,* 403 U.S. 602, 612-613 (1971); *Tilton* v. *Richardson,* 403 U.S. 672, 678 (1971). The court below also scrupulously observed the sharp constitutional line that this Court's decisions have drawn between public aid to the higher and lower levels of church-related education. See *Tilton* v. *Richardson, supra,* 403 U.S. at 685-686; *Committee for Public Education* v. *Nyquist,* 413 U.S. 756, 777 n.32 (1973).

Since there was no serious dispute that the challenged statute had the requisite secular purpose, the court below focused on the primary effect and excessive entanglement branches of the controlling Establishment Clause test. In evaluating the primary effect of the challenged aid program, the court below carefully considered the two factors that this Court has isolated to determine whether the primary effect is to advance religion—namely, whether the aid in question "flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or . . . funds a specifically religious function in an otherwise secular setting." *Hunt* v. *McNair,* 413 U.S. 734, 743 (1973).

With respect to the first of those factors, the court below concluded that the appellee colleges "are not so pervasively sectarian that aid [to them] would have a primary effect of advancing religion." J.S., p. A-11. That conclusion was based on the court's specific finding that the appellee colleges "conform closely to the colleges approved in *Tilton* v. *Richardson, supra.*" J.S., pp. A-10 to A-11. The court buttressed that conclusion by its particularized findings that none of the appellee colleges practice religious discrimination in faculty hiring and student admissions, that none compel their students to attend religious exercises, that religion does not in any way slant the content of courses taught by the appellee colleges and that all of the col-

leges foster an atmosphere of unfettered academic freedom. J.S., pp. A-38 to A-45; *compare Tilton* v. *Richardson, supra,* 403 U.S. at 686-87.[5]

The court below also ruled that the challenged aid program did not have an invalid primary effect because "[t]he aid program . . . cannot be said to fund a 'specifically religious activity in a secular setting.'" J.S., p. A-11. That ruling was based on the court's finding that "there are sufficient safeguards [in the statute and its administration] to prevent the use of funds for sectarian purposes." J.S., p. A-12. The court qualified that conclusion in only one respect. Because the court stated in its findings that it was unable to characterize how religion and theology courses at the appellee colleges were taught, J.S., p. A-46, it ruled that using state funds to support such courses "cannot be justified." J.S., pp. A-12 to A-13. Because the court found that the statutory prohibition against the use of state funds for sectarian purposes "must be interpreted as encompassing the study of religion or theology," J.S., p. A-50, it ruled that the Maryland Council "must take steps to ensure that public funds are not used to support such programs." J.S., p. A-13. Despite its professed inability to characterize how religion and theology are taught at the appellee colleges, the

[5] The court below noted that each appellee college "has as a secondary purpose the encouragement of the spiritual development of the students." J.S., p. A-19. These appellees do not dispute that conclusion. But the court stressed that "at none of these schools does this encouragement go beyond providing opportunities for religious experience." *Id.* The court also stressed that "[r]eligion does not permeate the secular educational function of these schools." J.S., p. A-14. It further stated that "[t]he religious programs at each school are separable from the secular programs, and the latter are the only beneficiaries of state aid." J.S., p. A-19.

court stressed that it was making no finding that those courses are in fact taught in a sectarian manner. J.S., p. A-50 n.9.

In its excessive entanglement analysis, the court below noted that this Court's decisions required it to evaluate the "character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." J.S., p. A-14. The appellants contended that the nature of the aid provided was the critical variable in the entanglement equation and that the aid challenged here was constitutionally infirm because, unlike the federal grants approved in *Tilton* v. *Richardson, supra,* it is not ideologically neutral. In an extensive analysis, the court below rejected that argument, J.S., pp. A-14 to A-21, relying principally on this Court's ruling in *Hunt* v. *McNair, supra,* that "the degree of entanglement . . . varies in large measure with the extent to which religion permeates the institution." 413 U.S. at 746.

The court below ruled that the administrative relationships that exist between state officials and church-related institutions under the challenged aid program were not entangling for two basic reasons. First, the court expressly found that "[r]eligion does not permeate the secular educational function of these schools." J.S., p. A-14. Because the challenged aid is strictly limited to the secular functions of recipient colleges, the administration of the program will result in no contact, let alone entanglement, between government and the religious activities of these institutions.

Second, because the court found that the appellee colleges varied hardly at all in their character and pur-

poses from the colleges involved in the *Tilton* case, it concluded there was no greater risk of entanglement in the administration of this program than there was in the *Tilton* program. "The relationship between church and state which results from this aid program is not entangling." J.S., p. A-17. Significantly, the court below noted that the aid program this Court approved in *Hunt* v. *McNair, supra,* "established a school-governmental relationship which was far more intimate and pervasive than any relationship likely to result from the statute now under consideration." J.S., p. A-21.

The court below also ruled that the appellee colleges need not repay any funds awarded them under the challenged aid program. The funds at issue were those awarded the appellee colleges during the first year of the aid program's operation and prior to the filing of the complaint. Under the principles set forth by this Court in *Lemon* v. *Kurtzman,* 411 U.S. 192 (1973) (*Lemon II*), the court refused to order repayment, although it had ruled that the statute was unconstitutional at the time of payment because it contained no restriction against sectarian use of grant funds. J.S., pp. A-23 to A-24. The dissenting judge concurred in the repayment ruling. J.S., p. A-34.

The dissent expressed no serious disagreement with the majority's analysis of how the aid program has functioned to date or of the essentially secular character of the appellee colleges. In fact, it appears that the dissenting judge subscribed fully to the findings of fact entered by the full court. Rather, the dissent was based on the fear that the challenged aid program had the "potential" for generating an invalid primary effect or excessive entanglement sometime in the indefinite future. J.S., pp. A-28, A-32, A-34.

D. Loyola College[6]

Loyola College, founded in 1852, is a coeducational liberal arts college located in the City of Baltimore. It is incorporated under the laws of the State of Maryland and is authorized by its charter "to confer any degree or degrees in any of the faculties, arts and sciences and liberal professions, which are usually permitted to be conferred in any college and university in the United States of America."[7] The sole authority for governing the college rests with its Board of Trustees.[8]

Loyola College's statement of objectives identifies it with the liberal arts tradition of higher education in this country. In its undergraduate divisions, the college offers courses in 26 academic departments leading to Bachelor of Arts and Bachelor of Science degrees.[9] Its liberal arts philosophy is reflected in the requirement that all students, irrespective of their major course of study, fulfill the requirement of a core curriculum designed to expose them to areas of study es-

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[6] The court below did not enter particularized findings with respect to each of the appellee colleges. It is quite clear from the generalized findings entered by the Court that these appellees —Loyola College and Mount Saint Mary's College— conform fully to the *Tilton* model of a church-related college eligible to receive public funds. The additional facts stated in this section and the following section concerning these appellees are designed solely to illuminate further the nature of the educational program offered by those institutions.

[7] Plaintiffs' Exhibit No. 121, pp. 6-7.

[8] Plaintiffs' Exhibit No. 144, app. B; Tr. 1138-39, 1246.

[9] Plaintiffs' Exhibit No. 121, pp. 55, 61; Tr. 1269.

sential to producing a liberally educated person.[10] The college is fully accredited by the Middle States Association of Colleges and Secondary Schools and is approved by the Maryland State Department of Education and the Regents of the University of the State of New York.[11]

Loyola College acknowledges that it is a church-related institution and that it has a secondary objective of encouraging the spiritual development of its students. However, as the court below expressly found, the pursuit of that objective does not go beyond "providing [students with] opportunities for religious experience." J.S., p. A-19. Participation by students in religious activities is totally voluntary. J.S., p. A-44. Loyola's relationship with the Roman Catholic Church is based on its identification with the Catholic and Jesuit tradition of liberal arts education[12] and the role that members of the Society of Jesus have played in founding and developing the college.[13] However, the

[10] See evidentiary citations collected in paragraphs 47 and 48 of the Proposed Findings of Fact submitted by Loyola College (hereinafter cited as "LC Proposed Findings"). The proposed findings are cited solely as a convenient collection of relevant evidentiary citations.

[11] Plaintiffs' Exhibit No. 121, inside cover.

[12] The evidence at trial, as well as the complete statement of objectives, make clear that the "Catholic" and "Jesuit" traditions referred to are educational in nature. The "Catholic" tradition is the adherence to the classical liberal arts program that includes the study of philosophy and theology in the core curriculum required of all students, a tradition that many liberal arts colleges have abandoned in recent years. Tr. 1170-74, 1634, 1644. The "Jesuit" tradition is found in the goal of producing liberally educated persons who will use their intellectual skills for the betterment of others. Tr. 1172-74; Plaintiffs' Exhibit No. 131, pp. 4-6.

[13] LC Proposed Findings, ¶¶ 46, 83.

college has no formal relationship with any ecclesiastical authority of the Roman Catholic Church and no official or agency of that Church exercises any juridical control over the college.[14] Loyola receives no financial assistance or support from any ecclesiastical or episcopal authority.[15] Based on these facts, the court below concluded that Loyola College, along with the other appellee institutions, is autonomous of any control or authority exercised by a religious body or organization. J.S., pp. A-16, A-43 to A-44.

Despite these aspects of its religious relationship, the court below expressly found that Loyola College is "characterized by an atmosphere of academic freedom rather than religious indoctrination." J.S., p. A-42. That finding, plus the court's conclusion that Loyola closely conformed to the characteristics of church-related colleges ruled eligible for public funds in *Tilton* v. *Richardson, supra,* is fully supported by the evidence. In essence, Loyola College is an institution "with admittedly religious functions but whose predominant higher education mission is to provide . . . students with a secular education." *Tilton* v. *Richardson, supra,* 403 U.S. at 687.

At the time of the trial of this case, Loyola College had received one grant in the amount of $157,000 under the challenged aid program. That grant was used for scholarships during the 1972-1973 academic year,[16] and the appellants conceded that no part of the grant was used directly for religious purposes.[17] The col-

[14] Tr. 1142-43, 1152.

[15] LC Proposed Findings, ¶ 86.

[16] J.S., p. A-50.

[17] Tr. 1182.

lege's Board of Trustees has directed that all future grants be placed in a separate checking account and specified that all future grants be used only for non-religious purposes.[18]

E. Mount Saint Mary's College

Mount Saint Mary's College, founded in 1808, is a coeducational liberal arts college located in Emmitsburg, Maryland. It is incorporated under the laws of the State of Maryland and is authorized by its charter "to confer on its deserving pupils collegiate honors and degrees of Bachelor and Master of Arts and of Doctors except Doctors of Medicine."[19] The sole responsibility for governance of the college rests with the Board of Trustees.[20]

Mount Saint Mary's statement of objectives defines its educational program in the context of the liberal arts tradition of higher education in this country.[21] The college offers courses in ten academic departments and awards students completing its four-year program Bachelor of Arts and Bachelor of Science degrees.[22] The college's liberal arts philosophy is reflected in the requirement that all students, irrespective of their major course of study, fulfill the requirements of the core curriculum, which consists of 48 semester hours of credit in six designated areas of study. The areas of study included in the core curriculum have been selected to satisfy the central goal of the liberal arts of educat-

[18] Tr. 1140-41.

[19] Defendants' Exhibit No. M-1.

[20] Plaintiffs' Exhibit No. 76, pp. 9-10; Tr. 738.

[21] Defendants' Exhibit No. M-2, pp. 6-7.

[22] *Id.* at pp. 40, 50-97.

ing the whole person.[23] The college is accredited by the Middle States Association of Colleges and Secondary Schools and by the Maryland State Department of Education. It is also recognized by the Regents of the University of the State of New York.[24]

Mount Saint Mary's College acknowledges that it is a church-related institution and that it has a secondary objective of encouraging the spiritual development of its students. However, as the court below expressly found, the pursuit of that objective does not go beyond "providing [students with] opportunities for religious experience." J.S., p. A-19. Participation by students in religious activities is wholly voluntary. J.S., p. A-44.

The college's relationship with the Roman Catholic Church is based on its self-description as "the second oldest Catholic college in the United States,"[25] the role that Roman Catholic priests have played in its founding and development,[26] and the presence of priests on campus who provide, outside the classroom, spiritual counseling to students who wish such counseling.[27] Neither the Roman Catholic Church nor any of its agencies exercise any control over or play any role in the governance or operations of the college.[28] The court below found that, "though the local head of the Catholic Church is an *ex officio* member of the Mt. St. Mary's Board of Trustees, no instance of entry of Church

[23] Tr. 745-47, 752; Defendants' Exhibit No. M-2, pp. 41-42.

[24] Tr. 744; Defendants' Exhibit No. M-2, p. 9.

[25] Defendants' Exhibit No. M-2, p. 8.

[26] *Id.*; Tr. 770-71.

[27] Tr. 753, 822-23.

[28] Tr. 757.

considerations into college decisions was shown." J.S., p. A-44. The college receives no financial support in any form from the Roman Catholic Church or any of its agencies.[29]

Despite these aspects of its religious relationship, the court below expressly found that Mount Saint Mary's College is "characterized by an atmosphere of academic freedom rather than religious indoctrination." J.S., p. A-42. That finding, plus the court's conclusion that Mount Saint Mary's closely conformed to the characteristics of the church-related colleges ruled eligible for public funds in *Tilton* v. *Richardson, supra,* is fully supported by the evidence. In essence, Mount Saint Mary's College is an institution "with admittedly religious functions but whose predominant higher education mission is to provide . . . students with a secular education." *Tilton* v. *Richardson, supra,* 403 U.S. at 687.

At the time of the trial in this case, Mount Saint Mary's College had received one grant in the amount of $117,500 under the challenged aid program. The court below expressly found with respect to that grant that "Mount St. Mary's employed restricted funds accounting, and demonstrated that no part of the grant . . . was used for sectarian purposes." J.S., p. A-50 to A-51. The Board of Trustees of the college has specified by resolution that all future grants from the state be placed in a separate checking account.[30]

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[29] *Id.*

[30] Tr. 817-18, 914.

SUMMARY OF ARGUMENT

I.

This Court's decisions have evolved a three-part test for determining whether an aid program for private education that benefits church-related schools is in conflict with the Establishment Clause. To pass that test, an aid program must have a secular purpose and a primary effect that neither advances nor inhibits religion and must not foster excessive government entanglement with religion. That test seeks to preserve the core Establishment Clause value of maintaining government's neutral posture when its actions affect religion or religious institutions.

While this Court's decisions have considered a variety of factors in applying the three-part Establishment Clause test, the decisive element in the Establishment Clause analysis is the religious character of schools that benefit from a challenged aid program. More specifically, those decisions focus on the extent to which religious indoctrination intrudes into and distorts the secular educational program of recipient schools. That factor explains why those decisions have drawn a sharp constitutional line between the higher and lower levels of church-related education. It also explains why this Court has had little difficulty sustaining aid to church-related colleges while, in recent years, consistently striking down aid programs for parochial elementary and secondary schools.

A challenged aid program must satisfy two conditions to meet the primary effect requirement. First, the enabling legislation must contain an express prohibition against religious use of public funds, and there must be effective administrative machinery to assure

that no recipient institution uses those funds for religious purposes. Second, the funds cannot flow to institutions at which religion is so pervasive that a substantial portion of their educational functions are subsumed in their religious missions. Whether recipient colleges are of that character is governed by the criteria applied by the Court in *Tilton* v. *Richardson,* 403 U.S. 672 (1971).

The entanglement branch of the Establishment Clause test does not bar all involvement of government in religious matters. In fact, the primary effect requirement that government prevent religious use of public funds necessarily means that an aid program will result in relationships between public officials and church-related colleges. What is prohibited is *excessive* entanglement with religion and, by its very terms, that test is one of degree.

Three factors enter into the entanglement analysis: the character and purposes of recipient colleges, the nature of the aid provided and the relationships between government and church-related institutions that result from the administration of the aid program. The first of those factors parallels the same inquiry in the primary effect analysis and is likewise governed by the criteria set forth in *Tilton* v. *Richardson, supra.* The second factor seeks to determine whether the aid extended is ideological in nature. The third factor examines whether, in light of the religious characters of recipient schools and the type of aid provided, government officials will necessarily become enmeshed in the religious activities of those institutions.

II.

That the Maryland aid program has the requisite secular purpose is not in dispute in this appeal. Thus, the primary effect and excessive entanglement branches of the controlling constitutional test are the focus of the inquiry. The findings of fact adopted by the court below establish beyond question that the primary effect of the Maryland aid program is not to advance religion and that there is no risk of excessive entanglement with religion in the administration of the program.

The enabling legislation for the Maryland program contains an explicit prohibition against the use of public funds for religious purposes, and the court below found that the Maryland Council has developed effective and non-entangling machinery for enforcing that prohibition. That conclusion is buttressed by the further finding that neither of these appellees used the grants they have received for religious purposes.

The findings concerning the educational programs of the appellee colleges reveal that those schools closely resemble the four church-related colleges found constitutionally eligible for public funds in *Tilton* v. *Richardson, supra.* For that reason, the court below reached the necessary conclusion that aid to those colleges will not have the primary effect of advancing religion.

Finally, the court below ruled that excessive government entanglement with religion has not resulted and will not result from the administration of the Maryland program. At the core of that ruling was the agreement by the court below with this Court's conclusion that the degree of entanglement varies in large measure with the extent to which religion permeates the secular educational program of a recipient college. Since the

appellee colleges are virtual mirror images of the *Tilton* colleges, there is no greater risk of government entanglement with religion here than there was in *Tilton*. The court below specifically rejected appellants' contention that the nature of the aid provided is the critical variable in the entanglement analysis and that the aid provided under the Maryland program is necessarily ideological in nature because it is broader in scope than the aid provided in *Tilton*. Consistent with this Court's decisions, the court below ruled that aid acquires an ideological coloration only if it flows to schools that have a "sectarian" character. The appellee colleges clearly are not of that character.

III.

The constitutional arguments fashioned by the appellants rest on a brittle foundation of factual and legal distortions. Appellants seek to support their arguments by culling from the extensive evidentiary record only those "facts" that support their constitutional claims. In the process, appellants totally disregard the carefully considered findings of fact adopted by the court below. Appellants invite this Court to draw factual conclusions that are completely in conflict with those findings and at war with the overwhelming weight of the evidentiary record in this case. Appellants' factual distortions are most blatant in their discussion of the faculty hiring and student recruitment practices at the appellee colleges, their characterization of how theology is taught at the appellee colleges, and their efforts to analogize the educational programs of the appellee colleges to those of the parochial schools involved in the *Lemon* and *Nyquist* decisions.

The partisan myopia that infects appellants' treatment of the evidentiary record also taints their reliance on this Court's Establishment Clause decision. Appellants seek to undermine the controlling authority of *Tilton* and *Hunt* by placing principal reliance on *Lemon* and *Nyquist*. But this Court drew a sharp constitutional line in *Tilton* between the higher and lower levels of church-related education for purposes of Establishment Clause analysis. *Lemon* and *Nyquist* dealt solely with parochial elementary schools, and the bases for those decisions are wholly irrelevant to determining the constitutional validity of the program of aid to higher education challenged here.

The essential basis for appellants' entanglement argument is the differences they perceive between the aid program challenged here and the aid program sustained in *Tilton*. However, the distinctions drawn by appellants either do not exist or have no constitutional significance. Appellants also suggest that the construction grants approved in *Tilton* constitute the outer limit of constitutionally permissible aid to church-related colleges. The *Tilton* decision will not support that crabbed construction of the Establishment Clause.

Appellants' primary effect argument is in total conflict with the explicit finding by the court below that "the primary effect of aid to these [colleges] is not to advance religion." That conclusion was based on the substantial findings that the Maryland program has an express prohibition against sectarian use of public funds, provides for effective but non-entangling enforcement of that prohibition, extends aid to institutions which are not pervasively sectarian, and will not result in public funding of religious activities. Appellants' contention that the Maryland program has a con-

stitutionally invalid primary effect is based solely on the pervasive evidentiary distortions that permeate their brief and assumptions about the controlling Establishment Clause decisions that are irrelevant to evaluating programs of aid to higher education.

Appellants conclude each of their various arguments with the sweeping assertion that the challenged aid program is unconstitutional on its face. A number of those arguments, however, are predicated upon practices which appellants allege exist at one or more of the appellee colleges. In making their sweeping claims of facial invalidity, appellants ignore the fact that thirteen private colleges and universities in Maryland which are not parties to this case receive grants under the challenged program and the right of those other institutions to receive those grants is in no way contested. Allegedly invalid practices at one or more of the appellee colleges cannot cause the entire program to fall, particularly in light of the severability clause in the enabling legislation. If this Court were to conclude that the practices of one or more of the appellee colleges render them ineligible for public aid, the only appropriate relief is to declare those institutions ineligible for public aid and to permit the Maryland program to continue to operate for the other eligible institutions.

IV.

Appellants also ask this Court to order the appellee colleges to repay to the state all grants received by them since this litigation was initiated. That request for relief is governed by this Court's decision in *Lemon II* and the equitable principles that decision enunciated. A proper application of those equitable principles requires that appellants be denied the relief of repayment, even if they should prevail on their main constitutional claims.

ARGUMENT

The central issue in this appeal—whether church-related educational institutions can, consistent with the strictures of the Establishment Clause, participate in a program of public aid to private education—presents no novel question to this Court. It is an issue that has been carefully and repeatedly scrutinized by the Court and that has produced seven major constitutional decisions in the past four years.[31] From those decisions has emerged a precise and definitive test for resolving that constitutional issue. That test is:

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Lemon* v. *Kurtzman,* 403 U.S. 602, 612-613 (1971); *Tilton* v. *Richardson,* 403 U.S. 672, 678 (1971).

The Court has employed that three-part test to sustain the only two programs of aid to higher education that it has examined. *Hunt* v. *McNair,* 413 U.S. 734 (1973); *Tilton* v. *Richardson, supra.*

The three-part standard enunciated in *Lemon* and *Tilton* is more than a test of constitutional validity; it is an expression of the core values underlying the Establishment Clause. Those values, which in many early decisions were often obscured by rhetoric and meta-

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[31] *Meek* v. *Pittenger,* 43 U.S.L.W. 4596 (U.S., May 19, 1975); *Committee for Public Education* v. *Nyquist,* 413 U.S. 756 (1973); *Levitt* v. *Committee for Public Education,* 413 U.S. 472 (1973); *Hunt* v. *McNair,* 413 U.S. 734 (1973); *Sloan* v. *Lemon,* 413 U.S. 825 (1973); *Tilton* v. *Richardson,* 413 U.S. 672 (1971); *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971).

phors[32] have become more clearly defined in recent years as the Court has been required to examine a variety of educational aid programs in the face of Establishment Clause challenges.

This Court's early decisions viewed the Establishment Clause as erecting a "wall of separation" between church and state.[33] But that metaphor has crumbled as the Court has attempted to apply the terse language of the Establishment Clause to diverse statutory and regulatory schemes. Indeed, the Court has conceded that "the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon* v. *Kurtzman, supra,* 403 U.S. at 614. In that same decision, the Court observed: "Candor compels acknowledgement . . . that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." 403 U.S. at 612; see also *Tilton* v. *Richardson, supra,* 403 U.S. at 678.

The Court has repeatedly insisted that the "constitutional standard is separation of Church and State." *Zorach* v. *Clauson,* 343 U.S. 236, 242 (1952); *Board of Education* v. *Allen,* 392 U.S. 236, 242 (1968). However, the Court has also stressed that the Establishment

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[32] In *Walz* v. *Tax Commission,* 397 U.S. 664, 668 (1970), the Court observed:

> "The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of [the Religion Clauses] that seemed clear in relation to the particular cases but have limited meaning as general principles."

[33] *Torcaso* v. *Watkins,* 367 U.S. 488, 493 (1961); *McCollum* v. *Board of Education,* 333 U.S. 203, 211 (1948); *Everson* v. *Board of Education,* 330 U.S. 1, 16 (1947).

Clause "does not say that in every and all respects there shall be a separation of Church and State." *Zorach* v. *Clauson, supra,* 343 U.S. at 312; see *Walz* v. *Tax Commission,* 397 U.S. 664, 670 (1970). "The problem, like many problems in constitutional law, is one of degree," *Zorach* v. *Clauson, supra,* 343 U.S. at 314; *Board of Education* v. *Allen, supra,* 392 U.S. at 242, and the degree of separation demanded is defined by the requirement that government be neutral in matters touching upon the religious affairs of its people.[34]

The principle of neutrality recognizes that, while separation of church and state is the constitutional goal, total separation of the two institutions into wholly separate spheres of activity is not possible in today's society. "The complexities of modern life inevitably produce some contact" between government and religious institutions. *Walz* v. *Tax Commission, supra,* 397 U.S. at 676. Particularly in the search for answers to modern social problems, the activities and concerns of religious organizations and government frequently overlap. See *McGowan* v. *Maryland,* 366 U.S. 420, 461-62 (1961) (opinion of Frankfurter, J.).

Churches and religious societies, along with other private groups, have long devoted generous amounts of time and energy to the problems of education, health and old-age security. In fact, in the early days of this nation, religious institutions and other private groups were virtually the only agencies in society en-

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[34] See, *e.g., Committee for Public Education* v. *Nyquist,* 413 U.S. 756, 788 (1973); *Walz* v. *Tax Commission, supra,* 397 U.S. at 669-70; *Board of Education* v. *Allen,* 392 U.S. 236, 242 (1968); *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 226 (1963); *Zorach* v. *Clauson,* 343 U.S. 306, 313-14 (1952); *Everson* v. *Board of Education,* 330 U.S. 1, 18 (1947).

gaged in those general welfare activities.[35] With the rapid growth of the welfare state in this country, government has assumed an increasingly larger role in seeking solutions to social problems. But the effect of that expanding government activity has not been to displace the beneficial services performed by churches and religious societies. Those institutions have continued to maintain schools, hospitals, orphanages and homes for the aged, as their resources have permitted.

The resultant contacts between governmental agencies and religious institutions have been many and varied. Church-related schools are required to satisfy government standards for curriculum content and quality. See *Board of Education* v. *Allen, supra,* 392 U.S. at 245-46. Church-sponsored hospitals and nursing homes must comply with government health and safety standards. The government makes available to religiously affiliated institutions services, such as fire and police protection, sewage disposal, and public streets and highways, which are available to the public generally. *Walz* v. *Tax Commission, supra,* 397 U.S. at 670; *Everson* v. *Board of Education,* 330 U.S. 1, 17-18 (1947.) And, in some instances, government has chosen to work through private institutions, including those with religious affiliations, to achieve its social welfare goals. See *Bradfield* v. *Roberts,* 175 U.S. 291 (1899). In view of these necessary and inevitable interactions between church and state in modern society, the principle of neutrality assures a course of

[35] D. Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part II. The Nonestablishment Principle,* 81 Harv. L. Rev. 513, 513-16 (1968); W. Stanmeyer, *Free Exercise and the Wall: Obsolescence of a Metaphor,* 37 Geo. Wash. L. Rev. 223, 225-28 (1968).

governmental conduct which neither advances nor inhibits religion while permitting religiously sponsored activities to coexist in the secular world.

The principle of neutrality also serves to reconcile the dictates of the Establishment Clause with the frequently overlapping, and occasionally competing, commands of the Free Exercise Clause of the First Amendment. See *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 222 (1963). In fact, in *Everson* v. *Board of Education, supra,* the Court expressly acknowledged that applying the Establishment Clause mechanically to deny religious organizations the benefits of public welfare programs can pose a threat to Free Exercise Clause values. 330 U.S. at 16. More recently, the Court stated:

> "The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with each other." *Walz* v. *Tax Commission, supra,* 397 U.S. at 668-69.

Thus, the principle of neutrality seeks to minimize the potential conflicts between the two religion clauses of the First Amendment and to promote the goal of religious liberty which both clauses are designed to implement.[36] The neutrality demanded of government by the Establishment Clause has been expressed in varying language by this Court, but the limitations imposed on government power by the command of neutrality are not in dispute. Governmental actions must be such that "no religion be sponsored, none commanded, and none prohibited." *Walz* v. *Tax Commission, supra,*

[36] See generally P. Kauper, *Religion and the Constitution* (1964).

397 U.S. at 669. Government can take no action that either advances or inhibits religion. *Board of Education* v. *Allen, supra,* 392 U.S. at 242-43; *Abington School Dist.* v. *Schempp, supra,* 374 U.S. at 222.

> "Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Walz* v. *Tax Commission, supra,* 397 U.S. at 669.

Careful observance of the principle of neutrality is essential in this case if core constitutional values are to be preserved. The Maryland aid program that the appellants challenge is in no sense a legislative scheme to promote church-related education. *Cf. Committee for Public Education* v. *Nyquist,* 413 U.S. 756, 783 (1973). As the court below noted, no question has been raised concerning the grants paid under the Maryland program to the 13 private colleges and universities not joined as parties to this action. J.S. App., p. A-4. And those 13 institutions receive more than two-thirds of the funds disbursed under the aid program. J.S. App., p. A-37 n.2.

The issue, therefore, is whether the appellee institutions should be barred from participating in an aid program designed to benefit private higher education in Maryland solely because they can be labeled "church-related." The evidence in this case emphatically establishes—and the court below expressly found—that the appellee colleges offer educational programs that are essentially secular in nature and that their religious attributes are clearly separable from their educational programs. To hold that such institutions cannot share

in an aid program designed to benefit private higher education generally would be a breach of the principle of neutrality. It would smack of an expression of hostility to religion.

I.

THE CONSTITUTIONAL TEST

The court below ruled that the Maryland aid program has a secular legislative purpose. J.S. App., p. A-9. The appellants do not contest that holding in this appeal. Appellants' Brief, p. 15. Thus, only the primary effect and excessive entanglement branches of the controlling Establishment Clause test are at issue in this case.

This Court's recent decisions have identified a number of factors that must be considered in determining whether a program of public aid for private education has an invalid primary effect or generates excessive government entanglement with religion. Those factors include the character and purposes of the schools that benefit from the aid, the presence of restrictions against the use of public funds for religious purposes, the type of aid provided and the relationships that are created between government and church-related institutions by the aid program. But those decisions leave no doubt that the critical element in the analysis is the religious character of institutions that benefit from the aid and, more specifically, the extent to which religious indoctrination intrudes into the educational program of a recipient school.

It is significant, for example, that the religious character of recipient institutions is a central factor in applying both the primary effect and excessive entanglement branches of the Establishment Clause test.

Indeed, in its most recent school aid decision, this Court ruled that one aspect of a Pennsylvania aid program had "the unconstitutional primary effect of advancing religion *because of* the predominantly religious character of the schools benefiting from the Act." *Meek* v. *Pittenger,* 43 U.S.L.W. 4596, 4600 (U.S., May 20, 1975) (emphasis added). More importantly, the contrasting results reached by this Court over the past four years in cases involving church-related elementary and secondary schools, on the one hand, and church-related colleges and universities, on the other hand, can be explained only by the differing religious characters of the church-related institutions involved in those cases.[37] Since 1971, this Court has struck down every program of aid to church-related elementary and secondary schools it has considered.[38] During that same period, it has sustained each program of aid to private higher education it has reviewed, even though church-related colleges and universities participated in those programs.[39]

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[37] D. Giannella, *Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement,* 1971 Sup. Ct. Rev. 147, 169; P. Kauper, *Public Aid for Parochial Schools and Church Colleges: The Lemon, DiCenso and Tilton Cases,* 13 Ariz. L. Rev. 567, 585-87 (1971).

[38] *Meek* v. *Pittenger, supra; Committee for Public Education* v. *Nyquist, supra; Levitt* v. *Committee for Public Education, supra; Sloan* v. *Lemon, supra; Lemon* v. *Kurtzman, supra.* While the *Meek* decision did sustain the textbook loan provision of the Pennsylvania program, that portion of the opinion did little more than reaffirm the pre-1971 decision in *Board of Education* v. *Allen,* 392 U.S. 236 (1968). The other features of the Pennsylvania program that went beyond the limited scope of the aid approved in *Allen* were struck down.

[39] *Hunt* v. *McNair, supra; Tilton* v. *Richardson, supra.*

Those contrasting results are explained by the demonstrable differences this Court has correctly perceived between the educational goals and programs of the higher and lower levels of church-related education. For example, the Court noted in *Tilton* v. *Richardson, supra:*[40]

> "There are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools. The 'affirmative if not dominant policy' of the instruction in pre-college church schools is 'to assure future adherents to a particular faith by having control of their total education at an early age.' . . . There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination. . . . The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the [legislative] objectives and limitations. Furthermore, by their very nature, college and post-graduate courses tend to limit the opportunities for sectarian influences by virtue of their own internal disciplines. Finally, many church-related colleges and universities seek to evoke free and critical responses from their students and are characterized by a high degree of academic freedom." 403 U.S. at 685-86.

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[40] The distinction between the higher and lower levels of church-related education was first drawn in the plurality opinion in the *Tilton* case. For convenience, however, the views expressed in the plurality opinion will be referred to throughout this brief as the views of the Court, since it is now clear that a majority of the Court has accepted the sharp constitutional line drawn in *Tilton* between the higher and lower levels of church-related education. See *Hunt* v. *McNair, supra; Committee for Public Education* v. *Nyquist, supra,* 413 U.S. at 777 n.32.

The sharp constitutional line that the Court has thus drawn between the higher and lower levels of church-related education underscores the central importance of the religious nature of institutions receiving public aid to the Establishment Clause issue in this case.

The decisions of this Court over the past four years leave no doubt that the intensity of a school's religious orientation, particularly in terms of its commitment to religious indoctrination,[41] is the decisive factor in applying the three-part Establishment Clause test. The fact that a college or university has religious attributes or performs religious functions is, standing alone, insufficient to disqualify such institutions from receiving public aid. The four Catholic colleges in the *Tilton* case were held eligible for public aid even though they performed "admittedly religious functions." 403 U.S. at 687. Under the *Tilton* and *Hunt* decisions, a college's religious character is constitutionally disabling only if its religious functions distort its secular educational program.

For example, the focus of this Court's primary effect inquiry in *Tilton* was whether "religion so *permeates the secular education* provided by church-related colleges and universities that their religious and secular *educational functions* are in fact inseparable." 403 U.S. at 680 (emphasis added). The secular integrity of course offerings was also stressed in the entanglement analysis in *Tilton*. The Court noted that the nature of "college and post-graduate courses tend to limit the opportunities for sectarian influence," 403

[41] See P. Kauper, *Public Aid to Parochial Schools and Church Colleges: The Lemon, DiCenso and Tilton Cases*, 13 Ariz. L. Rev. 567, 586 (1971).

U.S. at 686, and, as a result, "there is less likelihood . . . that religion will permeate *the area of secular education.*" 403 U.S. at 687 (emphasis added). Similarly, in *Hunt* v. *McNair, supra,* the Court noted that "there is no basis to conclude that the College's operations are oriented significantly towards sectarian rather than secular *education.*" 413 U.S. at 744 (emphasis added).

Consequently, the religious character of colleges benefiting from an educational aid program cannot be viewed in the abstract but must be considered in terms of its impact on the program of secular education offered by such institutions. That analysis explains the sharp constitutional line that this Court has drawn between the higher and lower levels of church-related education. That analysis is also central to the application of the controlling Establishment Clause test in this case.

A. Primary Effect

To pass constitutional muster, an educational aid program must have a "principal or primary effect that neither advances nor inhibits religion." *Lemon* v. *Kurtzman, supra,* 403 U.S. at 612. While the search for the requisite "primary" effect is not free of semantic difficulties,[42] the contours of the primary effect inquiry in this case have been firmly etched by the *Tilton* and *Hunt* decisions.

One point is now beyond question. If an aid program has the requisite secular effect, it is constitutionally irrelevant that it also has the incidental effect of conferring tangible benefits on religiously affiliated in-

[42] See *Committee for Public Education* v. *Nyquist, supra,* 413 U.S. at 783 n.39.

stitutions. This Court pointedly ruled in *Hunt* v. *McNair, supra:*

> "Whatever may be its initial appeal, the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected. . . . Stated another way, the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends." 413 U.S. at 742-43.

Any other rule would, of course, impose an absolute bar to the participation by church-related colleges in programs of public aid to private higher education. "The simplistic argument that every form of financial aid to church-sponsored activity violates the Establishment Clause was rejected long ago . . . ." *Tilton* v. *Richardson, supra,* 403 U.S. at 679.

The decision in *Hunt* v. *McNair, supra,* identifies the two gauges of primary effect in a higher education aid program:

> "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." 413 U.S. at 743.

The primary effect inquiry in this case, therefore, is reduced to isolating the criteria for determining whether either of those conditions is present here.

The question of whether public money funds a religious activity is governed by the decisions in *Board of*

Education v. *Allen,* 392 U.S. 236 (1968), and *Tilton* v. *Richardson, supra.* The *Allen* decision expressly recognized that church-related schools "are performing, in addition to their sectarian function, the task of secular education." 392 U.S. at 248. The challenged New York textbook loan law was sustained because the aid it provided was restricted to the secular educational functions performed by church-related schools. 392 U.S. at 244-45.

In *Tilton,* the Court noted that the challenged federal statute "was carefully drafted to ensure that the federally subsidized facilities would be devoted to the secular and not the religious functions of the recipient institutions." 403 U.S. at 679. Specifically, the statute prohibited the use of any federally funded facility for "sectarian instruction or religious worship." 20 U.S.C. § 751(a)(2). The record in the *Tilton* case showed unequivocally that "none of the four church-related institutions in this case has violated the statutory restrictions." 403 U.S. at 680.

The Court in *Tilton* did, however, find one of the provisions of the federal statute constitutionally defective on primary effect grounds. The statute gave the federal government a 20-year interest in all funded facilities and required that the restrictions against any religious use of those facilities remain in force during the period of the federal interest. 20 U.S.C. § 754. As the Court construed the statute, all such restrictions would expire at the end of 20 years.

> "Limiting the prohibition for religious use of the structure to 20 years obviously opens the facility to use for any purpose at the end of that period. . . . If, at the end of 20 years the building is, for example, converted into a chapel or otherwise used

> to promote religious interests, the original federal grant will in part have the effect of advancing religion." 403 U.S. at 683.

Thus, public aid to church-related colleges will not survive the primary effect inquiry if the aid program does not have built into it a prohibition against religious use of public funds and adequate procedures for enforcing the prohibition. In addition, particular grants will be invalidated if the recipient school uses public funds to support its religious activities.

The second aspect of the primary effect inquiry in this case—whether religion is too pervasive at colleges benefiting from the challenged aid program—is governed by the *Tilton* decision. Despite the sharp constitutional line that the Court has drawn betwen the higher and lower levels of church-related education, the Court indicated in *Tilton* that not all church-related colleges will necessarily be eligible to participate in public aid programs. The appellants in that case fashioned a "composite profile" of a "sectarian" college and argued that an institution fitting that profile was constitutionally barred from participating in a public aid program. According to the appellants, a "sectarian" college is one

> "which admits only students of a particular religion, requires them to participate in religious activities, compels them to comply with the doctrines and dogmas of the religion, forces them to attend church, requires them under penalty of dismissal to take instruction in the theology and doctrines of the religion, and does everything to propagate and advance a particular religion other than confer degrees in divinity." Brief for Appellants, pp. 10-11, *Tilton* v. *Richardson, supra.*

The Court appeared to agree that a college with those characteristics could not, consistent with the Establishment Clause, participate in an educational aid program. 403 U.S. at 682. But the Court found that none of the appellee colleges in the *Tilton* case conformed in any way to that composite profile.

The Court in *Tilton* fashioned its own model of an eligible church-related college and evaluated the appellee institutions in that case on the basis of that model. The elements in the Court's model include a college's admissions and hiring policies, whether attendance at religious worship is required, whether efforts are made in the curriculum to indoctrinate students in religious doctrine and the degree of academic freedom that exists. The record in the *Tilton* case showed the following with respect to those criteria:

> "All four schools are governed by Catholic religious organizations and the faculties and student bodies are predominantly Catholic. Nevertheless, the evidence shows that non-Catholics were admitted as students and given faculty appointments. Not one of these four institutions requires its students to attend religious services. Although all four schools require their students to take theology courses, the parties stipulated that these courses are taught according to the academic requirements of the subject matter and the teacher's concept of professional standards. The parties also stipulated that the courses covered a range of human religious experiences and are not limited to courses about the Roman Catholic religion. The schools introduced evidence that they made no attempt to indoctrinate students or to proselytize .... Finally, ... these four schools subscribe to a well-established set of principles of academic free-

> dom, and nothing in this record shows that those principles are not in fact followed." 403 U.S. at 686-87.

The Court concluded that "the evidence shows institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education." 403 U.S. at 687.

In *Hunt* v. *McNair, supra,* the Court relied directly on the *Tilton* model of an eligible church-related college in evaluating the institution whose application for aid had been questioned. After noting that the South Carolina Baptist Convention exercised certain control over the college's operation, the Court observed that "it was likewise true of the institutions involved in *Tilton* that they were 'governed by Catholic religious organizations.'" 413 U.S. at 743. The Court also stated that "there is no evidence here to demonstrate that the College is any more an instrument of religious indoctrination than were the colleges and universities involved in *Tilton.*" 413 U.S. at 746. In addition, the Court relied heavily on the *Tilton* criteria of nondiscriminatory admissions and hiring policies in finding that the college involved in *Hunt* was eligible to receive public aid. 413 U.S. at 743-44. Thus, the *Tilton* decision clearly establishes the controlling standards for determining whether a church-related college receiving public funds is "an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission." 413 U.S. at 743.

Consequently, an aid program in which church-related colleges participate will not have the prohibited primary effect unless those challenging the program

can prove[43] that there are not sufficient safeguards in the statute to prevent public funds from being used for religious purposes or that recipient colleges have such a pervasively sectarian character as described in the "composite profile" referred to in the *Tilton* decision.

B. Excessive Entanglement

The guideposts that have been set out for measuring an aid program's primary effect are noticeably lacking for evaluating whether excessive government entanglement with religion has resulted from such a program.[44] The difficulties of application inhere in the entanglement test itself. Involvement of the sovereign in religious matters or in the affairs of religiously affiliated institutions is not absolutely barred. What is prohibited is "*excessive* government entanglement with religion," and that test "is inescapably one of degree." *Walz* v. *Tax Commission,* 397 U.S. 664, 674 (1970) (emphasis added).

The Court explicitly acknowledged in *Lemon* v. *Kurtzman, supra,* that some involvement between government and religion is unavoidable.

> "Some relationship between government and religious organizations is inevitable. . . . Fire inspections, building and zoning regulations, and state law requirements under compulsory attendance

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[43] The burden of proving that a challenged aid program has an invalid primary effect is clearly on those bringing the challenge. *Hunt* v. *McNair, supra,* 413 U.S. at 746 n.8; *Board of Education* v. *Allen,* 392 U.S. 236, 248 (1968).

[44] "[C]ne must be wary of a simple barometric approach that would measure degrees of entanglement." D. Giannella, *Lemon and Tilton: The Bitter and Sweet of Church-State Entanglement,* 1971 Sup. Ct. Rev. 147, 172.

> laws are examples of necessary and permissible contacts. Indeed, under the statutory exemption before us in *Walz,* the State had a continuing burden to ascertain that the exempt property was in fact being used for religious worship." 403 U.S. at 614.

Moreover, when the Court invalidated the 20-year limitation on federal supervision of funded facilities in *Tilton,* it mandated a continuing and long-term involvement between the federal government and church-related colleges which receive federal grants. The problem, therefore, is to identify the line between permissible involvement and excessive entanglement.

The problem is complicated by the necessary interrelationship between the requirement of a primary secular effect and the strictures against excessive entanglement. As has already been noted, an aid program must contain sufficient safeguards to assure that public funds awarded to a church-related college will not support its religious activities. That requirement anticipates that there will be governmental oversight of how those funds are expended, creating an inevitable involvement of public officials in the affairs of a recipient college. The entanglement prohibition simply requires that any such administrative supervision of an aid program avoid *excessive* entanglement with religion.

Since this Court has rejected the argument that the Establishment Clause bars all aid to church-related institutions [45] the apparently conflicting commands of the effect and entanglement tests are not irreconcilable. There is a channel of permissible governmental action between the Scylla of an invalid religious effect and the

[45] *E.g., Tilton* v. *Richardson, supra,* 403 U.S. at 679.

Charybdis of excessive entanglement. The decisions in *Tilton* and *Hunt* illustrate that, at least in the higher education setting, it is a channel that can be safely navigated.

Three factors enter into the entanglement analysis: "the character and purposes of the institutions that are aided, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." *Lemon* v. *Kurtzman, supra,* 403 U.S. at 615. The more recent decision in *Hunt* v. *McNair, supra,* makes quite clear that the first of those factors—the character and purposes of schools benefiting from an aid program—is the critical variable in the entanglement equation.

> "The Court's opinion in *Lemon* and the plurality opinion in *Tilton* are grounded on the proposition that the degree of entanglement . . . varies in large measure with the extent to which religion permeates the institution." 413 U.S. at 746.

The character and purposes of recipient institutions must be evaluated in light of the *Tilton* criteria. Those criteria are designed to discern the extent to which a college's educational program is employed as a vehicle for religious indoctrination. The Court in *Tilton* found a direct correlation between the extent to which religion intrudes into a college's curriculum and the risk of excessive entanglement.

> "Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education. This reduces the risk that government aid will in fact serve to support religious activities. Correspondingly, the

necessity for intensive government surveillance is diminished and the resulting entanglements between government and religion lessened." 403 U.S. at 687.

The *Tilton* colleges stood in sharp contrast to the parochial schools in *Lemon* v. *Kurtzman, supra,* which were involved in the "process of inculcating religious doctrine" and whose educational program thus became "a powerful vehicle for transmitting the Catholic faith to the next generation." 403 U.S. at 616. The Court explicitly ruled in *Lemon:* "The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid." *Id.*

The second variable in the entanglement analysis is the type of aid provided to church-related schools. The Court acknowledged in *Lemon* that government can extend to such schools "secular, neutral, or nonideological services, facilities, or materials." 403 U.S. at 616. The Court suggested that the teacher salary supplements at issue in *Lemon* were struck down because they were "ideological" in character while the federally funded buildings challenged in *Tilton* were valid because they were "nonideological" in character. 403 U.S. at 687-88.

Closer analysis, however, indicates that the difference in the type of aid provided in *Lemon* and *Tilton* was not a critical factor in the differing results on the entanglement issue in those cases. In both cases, public funds aided the instructional process in church-related schools. In *Lemon,* that process was aided by subsidizing the salaries of parochial school teachers. In *Tilton,* federal funds built the classrooms in which the instruction occurred. Just as the state officials in *Lemon* were

required to satisfy themselves that no teacher whose salary was paid with public funds engaged in religious instruction, the federal government in *Tilton* was obligated to prevent the use of any federally funded classroom for sectarian instruction. The danger of excessive entanglement flows from the prophylactic measures that government must take to prevent a religious use of public funds. Because the prophylactic measures that would be required under the *Lemon* and *Tilton* aid programs would be identical, the different entanglement holdings in the two cases cannot be satisfactorily explained by the type of aid provided or by labeling one "ideological" and the other "nonideological." The different results can be explained only by the differences the Court perceived in the religious orientation of the instructional processes in the church-related schools involved in *Lemon* and *Tilton.*

The third element in the entanglement analysis is the relationship that arises between government and church-related schools in the administration of an aid program. The *Lemon* decision identifies two types of administrative contacts with such schools that might lead to excessive entanglement with religion. The first involves the steps government officials must take to assure themselves that public funds are not diverted to religious uses. 403 U.S. at 615-19. The second is the imposition of certain accounting and auditing requirements to assure compliance with statutory restrictions. 403 U.S. at 621-22. The first of those two types of administrative contacts was clearly decisive in *Lemon,*[46]

[46] The key entanglement in *Lemon* . . . must be the required administrative surveillance of the educational process in church-related schools to determine that religious instruction is not mixed with the secular." D. Giannella, *Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement,* 1971 Sup. Ct. Rev. 147, 173.

and that type of administrative relationship was viewed as constitutionally disabling in that case because of the strongly religious character of the educational process in parochial elementary and secondary schools.

The analysis in *Lemon* of the administrative supervision required of parochial school teachers was tied directly to the educational processes in those schools.

> "The teacher is employed by a religious organization, subject to the direction and discipline of religious authorities, and works in a system dedicated to rearing children in a particular faith . . . . Inevitably some of the teacher's responsibilities hover on the border between secular and religious orientation . . . . [A] dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral . . . . With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine." 403 U.S. at 618-19.

Because there was no clear separation between the secular and the religious in the educational process in parochial schools, public officials would have to exercise close supervision over the activities of teachers whose salaries were paid with state funds. The state

> "has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion. . . . A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. . . . These

> prophylactic contacts will involve excessive and enduring entanglement between church and state." 403 U.S. at 619.

There is little question, therefore, that the administrative supervision of the educational process in parochial schools was, standing alone, a sufficient basis for striking down the aid programs challenged in *Lemon*.

The suggestion in *Lemon* that the accounting and auditing requirements of an aid program might be an independent basis for finding excessive entanglement is also explained by the religious character of the parochial schools in that case.[47] There is nothing inherently religious or sectarian about bookkeeping methods and practices. It was not the auditing process itself that was of concern but the judgments that public officials might be required to make as the result of an audit. Thus, the Court spoke of "the government's post-audit power to inspect and evaluate a church-related school's financial records and *to determine which expenditures are religious and which are secular.*" 403 U.S. at 621-22 (emphasis added). Those determinations can be difficult and potentially entangling where there is a blending of the secular and the sacred in the educational process. But if public aid is restricted to a church-related school's secular educational functions and if its secular educational program is not a vehicle for religious indoctrination, no such judgments will be

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[47] It is doubtful that the aid programs challenged in *Lemon* would have been struck down solely because of the accounting and auditing requirements of those programs. "Entanglement through bookkeeping apepars to be merely a make-weight argument." D. Giannella, *Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement*, 1971 Sup. Ct. Rev. 147, 166.

necessary in the auditing process. For that reason, auditing provisions in an aid program pose a threat of government entanglement with religion only if the secular and the religious are not separable in the educational programs of church-related schools benefiting from the aid.

Any other approach to the auditing problem would produce anomalous results. Auditing provisions are a common adjunct to government grant programs to assure a proper accountability for public funds. The accountability requirements are particularly stringent when grants are extended to private institutions and organizations.[48] Legislatures clearly have the right and duty to impose strict accountability requirements on the disbursement of public funds. Taxpayers demand nothing less. To suggest that such accountability provisions in an aid program will, by their own force, produce excessive entanglement would be to encourage fiscal irresponsibility in the administration of such aid programs. Moreover, government would be frustrated in its efforts to comply with the primary effect requirement of assuring that no public funds are spent by church-related institutions for religious purposes.

Thus, as was true in the application of the primary effect branch of the controlling Establishment Clause test, the extent to which religion infuses the educational program of a church-related school is the central focus of the inquiry into whether a school aid program will

[48] See *e.g.*, Hill Burton Act of 1964, 42 U.S.C. § 291; Mental Retardation Facilities and Mental Health Centers Act, 42 U.S.C. §§ 2261, 2281-88q; Economic Opportunity Act, 42 U.S.C. §§ 2701, 2711-68, 2941-80.

result in excessive government entanglement with religion.[49]

II.

APPLYING THE CONSTITUTIONAL TEST

The Court below ruled that the Maryland college aid program has a primary secular effect and presented no risk of excessive government entanglement with religion. Those rulings are fully supported by the extensive evidentiary record of this case.

A. Primary Effect

The court below found that "the primary effect of aid to [the appellee colleges] is not to advance religion." J.S. App., p. A-43. That ruling was based on the court's conclusions that the aid to the appellee colleges did not fund a specifically religious activity in a secular setting and that none of the appellee colleges was pervasively sectarian. J.S. App., pp. A-10 to A-13.

The authorizing legislation for the Maryland aid program contains an express prohibition against any religious use of the funds awarded to eligible institutions. "None of the moneys payable under this subtitle shall be utilized by the institutions for sectarian

[49] The Court in *Lemon* identified a "broader base of entanglement" that could arise from a school aid program—namely, the potential for political divisiveness that might develop along religious lines. 403 U.S. at 622-24. The Court noted in *Tilton*, however, that such divisiveness is unlikely to result from a program of aid to higher education in which church-related colleges participate. 403 U.S. at 688-89. Moreover, the suggestion that political divisiveness may be an independent Establishment Clause ground for invalidating legislation raises serious questions of infringement of other First Amendment rights. See D. Louisell, Book Review, 83 Yale L.J. 197, 207-08 (1973).

purposes." J.S. App., p. A-54. In addition, any institution which awards only seminarian or theological degrees is ineligible to receive funds under the program. J.S. App., p. A-53. Those limitations vary only in their verbal formulation from the restrictions imposed under the aid programs challenged in *Hunt* and *Tilton*. In both of those cases, the statutes in question provided that no aid could be awarded for

> "any facility used or to be used for sectarian instruction or as a place of religious worship nor any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity for any religious denomination." 413 U.S. at 736-37; see 403 U.S. at 675.

The statutory restrictions in the Maryland program fairly encompass those prohibitions. And, in both *Hunt* and *Tilton*, this Court found those restrictions sufficient to satisfy the primary effect requirement.

The *Tilton* decision also stressed that the statutory religious use restrictions "have been enforced in the Act's actual administration." 403 U.S. at 680; see also *Hunt* v. *McNair, supra*, 413 U.S. at 744-45. The court below came to a similar conclusion when it ruled that the Maryland program contains "sufficient safeguards to prevent the use of funds for sectarian purposes." J.S. App., p. A-12. That conclusion was based, *inter alia*, on the fact that the president of each recipient college must verify under oath that no public funds will be used for sectarian purposes and that the Maryland Council has developed effective procedures for verifying that no portion of a grant is used for religious purposes. J.S. App., pp. A-47 to A-49. The effectiveness of these administrative procedures is underscored by

the specific finding that neither of these appellees had used their state grants for religious purposes. J.S. App., pp. A-50 to A-51. Thus, the Maryland program clearly satisfies the primary effect requirement that public funds not be used to fund a specifically religious activity.

The findings entered by the court below also emphatically establish that the Maryland program satisfies the second primary effect requirement that no public funds flow to "pervasively sectarian" institutions. The court below explicitly stated:

> "The . . . defendant [colleges] in this case have been found to conform closely to the colleges approved in *Tilton* v. *Richardson, supra*. . . . Thus, as a matter of fact the defendants are not so pervasively sectarian that aid [to them] would have a primary effect of advancing religion." J.S. App., pp. A-10 to A-11.

That holding is fully supported by the following remarkable parallels between the appellee colleges and the *Tilton* colleges:

1. In *Tilton*, "[a]ll four schools are governed by Catholic religious organizations." 403 U.S. at 686. The court below found that "each of the [appellee colleges], with the exception of St. Joseph's College, have, or recently had, quotas for membership on the governing board based on religion or membership in a religious order." J.S. App., p. A-43. But, as this Court ruled in *Hunt*, "formal denominational control over a liberal arts college does not render all aid to the institution a violation of the Establishment Clause." 413 U.S. at 746 n.8.

2. In *Tilton*, the faculties and student bodies at the four colleges were "predominantly Catholic" but "non-

Catholics were admitted as students and given faculty appointments." 403 U.S. at 686. The court below found that the appellee colleges did not discriminate on religious grounds in faculty hiring or student admissions. J.S. App., pp. A-40 to A-41, A-44.

3. In *Tilton,* "[n]ot one of these four institutions requires its students to attend religious services." 403 U.S. at 686. The court below found that "none of the [appellee colleges] require attendance at any religious exercise." J.S. App., p. A-44.

4. In *Tilton,* the evidence showed that the four colleges "made no attempt to indoctrinate students or to proselytize." 403 U.S. at 687. The court below found that "religious indoctrination is not a substantial purpose or activity of ary of the [appellee colleges]." J.S. App., p. A-47.

5. In *Tilton,* "these four schools subscribe to a well-established set of principles of academic freedom, and nothing in this record shows that these principles are not in fact followed." 403 U.S. at 687. The court below found that "[e]ach [appellee college] subscribes to the 1940 Statement of Principles on Academic Freedom of the American Association of University Professors, and each obviously abides by it." J.S. App., p. A-39.

In view of those remarkable parallels, the court below borrowed directly from the *Tilton* decision for its more general conclusions that "courses at each [appellee college] are taught 'according to the academic requirements intrinsic to the subject matter and the individual teacher's concept of professional standards,'" J.S. App., A-40, and that "each [appellee college] is 'characterized by an atmosphere of academic

freedom rather than religious indoctrination.'" J.S. App., p. A-42.

The only point of arguable departure between the findings in this case and the *Tilton* criteria is in the area of the teaching of theology or religion courses. The observations in *Tilton* on that issue were based on the stipulations of the parties. See 403 U.S. at 686-87. There were no such stipulations in this case, and the court below made only limited findings on the issue because it found itself "unable to characterize the manner in which theology and religion courses are conducted." J.S. App., p. A-42. However, the court below stressed that it was making no finding that the appellee colleges teach theology and religion in a sectarian manner. J.S. App., p. A-50 n.9. In addition, the court below also emphasized that its limited findings with respect to how theology is taught in no way impaired its more general finding that "religious indoctrination is not a substantial purpose or activity of any of these [appellee colleges]." J.S. App., pp. A-46 to A-47.

The vacillation by the court below on the theology question appeared to stem from its belief that it was not "legally empowered . . . to characterize the manner in which theology and religion are studied at these schools." J.S. App., p. A-46. Had the court below not felt it was under legal constraint, it would have found that evidence overwhelmingly demonstrated that these appellee colleges teach theology in a strictly academic fashion and make no effort in their theology courses to advocate a particular religious viewpoint.[50]

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[50] The evidence on the theology issue presented by these appellees is sumarized in the Mount Saint Mary's College Proposed Findings of Fact, ¶¶ 51-61, and the Loyola College Proposed Findings of Fact, ¶¶ 49-57.

Thus, consideration of the evidentiary record on that issue would show that these appellees match precisely the model fashioned in *Tilton* of church-related colleges eligible to receive public funds. The appellee colleges are, therefore, "institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education." 403 U.S. at 687.

If aid to the four Catholic colleges in the *Tilton* case did not have the primary effect of advancing religion, aid to other church-related colleges having identical characteristics cannot have such an effect. The appellee colleges were found to possess those characteristics, and the court below was clearly correct in concluding that "the primary effect of aid to [the appellee colleges] is not to advance religion." J.S. App., p. A-43.

B. Excessive Entanglement

As mandated by this Court's prior decisions, the court below examined the character and purposes of the appellee colleges, the form of aid provided under the Maryland program and the administrative procedures under the program to determine whether excessive government entanglement with religion has been a by-product of the program. The court below concluded that no such entanglement has resulted or would result.

Having already found that the appellee colleges had the essential characteristics of the *Tilton* colleges, the court below disposed quickly of the first part of the entanglement analysis.

> "It need only be noted that these schools perform essentially secular educational functions and are quite similar to the defendant schools in *Tilton*.

> Religion does not permeate the secular educational functions of these schools." J.S. App., p. A-14.

Because the appellants had argued, as they do in this Court, that the nature of the aid provided is the critical variable in the entanglement equation, the court below focused on that factor in its analysis.

After reviewing the forms of aid to church-related education that this Court has approved and disapproved, the court below said:

> "What emerges from a consideration of these cases is the conviction that the ideological neutrality of a particular program of aid is dependent on the type of institution that is being benefited. The classroom buildings provided in *Tilton* and *Hunt* are no more neutral in the abstract than the classroom buildings which were maintained with public funds in *Nyquist*. The classes taught in *Tilton* and *Hunt* classrooms are no more neutral than the classes taught by publicly subsidized teachers in *Lemon*, all other things being equal. Obviously, all other things are not equal. What would be impermissible in an institution staffed by members of a particular faith, administratively controlled by a religious body, and dedicated to the inculcation of a particular faith, may well be permissible in an autonomous institution staffed by faculty hired on the basis of academic merit, where academic freedom prevails, and where courses are taught in accordance with the requirements of an academic discipline." J.S. App., pp. A-15 to A-16.

For those reasons, the court below rejected appellants' contention that the Maryland aid program "is not ideologically neutral because in some respects it may resemble aid programs previously found unconstitutional in a lower school context." *Id.* at p. A-16. In

so ruling, the court below relied expressly on this Court's holding that "the degree of entanglement . . . varies in large measure with the extent to which religion permeates the institution." *Id.*

The court below acknowledged that the aid provided under the Maryland program is different in form from the aid approved in *Tilton* and *Hunt*. Those two cases involved special purpose grants that could be used by recipient colleges only for the construction of academic facilities. The Maryland program, by contrast, provides general-purpose or non-categorical grants which can be used for any purpose except those prohibited by the enabling legislation. The principal prohibition, of course, is that the grants cannot be used for sectarian purposes. The court below found the differences in the aid programs to be without constitutional significance.

> "Every non-sectarian program in the defendant colleges could be benefited by the federal aid program [approved in *Tilton*], and the difference between the *Tilton* aid program and the Maryland aid program resolves itself into a difference between construction grants and non-categorical grants. Clearly the latter distinction does not rise to constitutional dimensions." J.S. App., p. A-17.

That reasoning is unassailable. The Establishment Clause prohibits certain uses of public funds; it does not specify the purposes for which public funds can be used. The essential limitation imposed by the Establishment Clause is that public funds not be used for religious purposes. That limitation is observed in the Maryland program, even though the aid provided is non-categorical in nature.

Thus, a program of aid to private higher education acquires an ideological coloration, if at all, from the

ideological character of recipient institutions. On that issue, the court below ruled:

> "[T]he neutrality of the aid is dependent upon the essential character of the school. Where the secular aspects of a school may be separated from the sectarian, as in the case of these defendants, aid to the [secular] aspect, regardless of the form of the aid, will necessarily be religiously neutral. The aid in this program is restricted to the secular aspects of the institutions. . . . The religious programs at each school are separable from the secular programs, and the latter are the only beneficiaries of state aid." J.S. App., p. A-19.

On this basis, the court below concluded that the challenged aid program would not by its nature engender excessive government entanglement with religion.

Finally, the court below examined the administration of the Maryland program and ruled that "[t]he relationship between church and state which results from this aid program is not entangling." J.S. App., p. A-17. That ruling was based in part on the expertise that the Maryland Council had developed concerning the appellee colleges independent of its role as administrator of the aid program. *Id.* It was also based in part on the fact that the Maryland Council had developed an effective program for verifying nonreligious use of public funds without having to make difficult judgments over which expenditures were secular and which were religious. J.S. App., p. A-18. But central to that ruling was the finding that, "[b]ecause of the nature of the recipient schools, there is no necessity for state officials to investigate the conduct of particular classes . . . to determine whether a school is attempting to indoctrinate its students under the guise of secular education." *Id.* Significantly, the

court below also noted that the aid program challenged in *Hunt* was approved by this Court "even though it established a school-governmental relationship which was far more intimate and pervasive than any relationship likely to result from the statute now under consideration." J.S. App., p. A-21.

The court below did qualify its entanglement findings in one respect. Because it professed to be unable to characterize how theology and religion are taught at the appellee institutions and because it feared that those courses might "become an instrument for strengthening the students' religious life," J.S. App., p. A-49, the court feared that the Maryland Council might have to make an annual inquiry into how those courses are taught. Should such an inquiry be undertaken, "the risk of the Council becoming entangled with religion would be great." J.S. App., p. A-50. For that reason, the court ruled that

> "the Act must be administered so as to prevent any state funds from supporting the religious studies or theology programs at any institution. 'Sectarian purposes,' as that term is used in Art. 77A, §68A, must be interpreted as encompassing the study of religion or theology." *Id.*

If it is assumed that the theology courses at these appellees might be transformed into vehicles for religious indoctrination,[51] the narrowing construction of the "sectarian" use restriction is consistent with this

[51] These appellees disagree with that assumption. The evidence presented by these appellees on that issue establish beyond any doubt that their theology courses have an inherent academic integrity and that any effort to use those courses for religious indoctrination would do violence to the educational goals of the two institutions.

Court's Establishment Clause decisions. The lesson of *Lemon* v. *Kurtzman, supra,* and its progeny is that government must avoid not only actual entanglement but the potential for excessive entanglement with religion. If there is a perceived risk that the theology courses of the appellee colleges will be used to proselytize religion, the safer course is to prohibit those institutions from using public funds to support the teaching of those courses and thus avoid any potentially entangling inquiries into how those courses are taught.

It is clear that the Maryland statute is susceptible to the construction given it by the court below. The term "sectarian purposes" in the statute can fairly be construed to mean any religious purpose. Thus, including support for theology courses within the category of prohibited "sectarian" purposes is proper, even though the court below expressly refused to find that those courses are taught in a sectarian fashion at the appellee colleges. J.S. App., p. A-50 n.9.

Moreover, the *Hunt* decision supports the authority of the court below to construe the Maryland statute in a manner that avoids the potential for excessive entanglement. The statute challenged in *Hunt* purported to vest broad authority in a state agency over the operations of a college accepting the state aid. This Court characterized those powers as "sweeping" and added that "were there a realistic likelihood that they would be exercised in their full detail, the entanglement problems . . . would not be insignificant." 413 U.S. at 747. This Court noted, however, that the court below had given "a narrow interpretation of the practical operation of these powers." 413 U.S. at 748. For that reason, this Court ruled that the challenged aid

program did not "foreshadow excessive entanglement between the State and religion." 413 U.S. at 749. The court below has done nothing more in this case than the lower court did in *Hunt*. It has identified an area of potentially excessive entanglement in the administration of an aid program and it has eliminated that potential by a narrowing construction of the statute.

These appellees submit that the ruling by the court below that the Maryland aid program will not engender actual or potential excessive government entanglement with religion is fully supported by its findings of fact and the complete evidentiary record of this case.

III.

APPELLANTS' ESTABLISHMENT CLAUSE ARGUMENTS

The principal but unstated premise of the appellants' brief is that this Court should conduct a *de novo* review of the evidentiary record in this case. The appellants have grounded their Establishment Clause arguments in factual assumptions that are in conflict with the weight of the evidence and at war with the carefully considered findings of fact entered by the court below and subscribed to by all three judges below. This Court can accept the appellants' arguments only if it is willing to disregard those findings of fact and adopt the appellants' deliberately distorted version of the evidentiary record developed after a five-week trial.

The appellants had ample opportunity to persuade the court below to endorse their view of the evidentiary record. Following the lengthy trial of this case, all parties were given approximately two months to prepare and submit proposed findings of fact. All

parties in fact submitted extensive proposed findings.[52] Three months later the court below entered its initial findings and gave the parties an opportunity to submit written comments on and proposed revisions of the initial findings. That court heard extended oral argument on the written comments and proposed revisions and subsequently entered its final findings, which incorporated some of the proposed revisions.

The appellants participated fully at all stages of the development of the findings, which "constitute the sole factual basis" for the opinion of the court below. J.S. App., p. A-4. The court below was clearly unpersuaded by the appellants' distorted version of the evidentiary record since it rejected virtually all of the proposed findings they submitted. Nevertheless, the appellants have now filed a brief with this Court predicated on "facts" that are little more than a rehash of the proposed findings rejected by the court below.

Because evidentiary distortions so thoroughly permeate the appellants' brief, it would unduly lengthen this brief to discuss each of those distortions. But a few examples will illustrate the scope of the problem.

In an effort to support their unsupportable assertion that theology courses at the appellee colleges are "admittedly taught for religious purposes," Appellants' Brief, p. 21, appellants have wrenched from context a single sentence from the testimony of Dr. Felix Malmberg, Chairman of the Loyola College Theology Department. *Id.* at p. 73. That sentence purportedly supports appellants' assertion that "there is no sub-

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[52] For example, the proposed findings submitted by Loyola College and Mount Saint Mary's College were 37 and 44 pages in length, respectively.

stantial difference between the teaching of religion to precollege students *vis a vis* college students." *Id.* Appellants seek to use that single sentence from Dr. Malmberg's testimony to invite an inference based on an unstated premise. The unstated premise is that religion is taught to pre-college students in an indoctrinating fashion. And because Dr. Malmberg testified that theology should be taught to precollege and college students in the same fashion, appellants invite the inference that theology is in fact taught at Loyola for purposes of indoctrination.

What appellants neglect to quote is the sentence in Dr. Malmberg's testimony immediately following the sentence they excerpt in their brief. That sentence reads: "[T]he whole intention, the whole meaning of instruction in religion is not indoctrination, but is to inform." Tr. 1370. Thus, Dr. Malmberg's testimony relied upon by the appellants not only fails to support the inference they invite but totally contradicts it. When Dr. Malmberg testified that religion should be taught in the same manner to college and precollege students, he clearly meant that it should be taught in an academic manner at both levels.

There is a similar problem with appellants' effort to show that the study of theology at Mount Saint Mary's College "is an instrument for strengthening the students' religious life." Appellants' Brief, p. 72. The only "support" that appellants can marshall for that assertion is that "[t]he chairman of the theology department at Mount Saint Mary's College testified that in no case to his knowledge had any theology teacher taken a *personal* position contrary to the Roman Catholic Church." *Id.* (emphasis added) But the extent to which a professor injects his personal opinions into a course is hardly a criteria for determining whether the course is taught as an academic discipline. Indeed, peppering a course with personal opinions could easily undermine its academic integrity.

What the undisputed evidence does show is that members of the Theology Department at Mount Saint Mary's College are free to, and in fact do, present their students with viewpoints, whether personally held or not, that are in conflict with positions taken by the Roman Catholic Church or theological questions. Tr. 1053-54, 1058; Plaintiffs' Exhibit No. 116B, pp. 4-5, 8-9. That a course covers all academically relevant viewpoints, whether or not the professor agrees with those vewpoints, is a test of its academic integrity, and the theology courses at Mount Saint Mary's College clearly pass that test.

The appellants also assert, in direct conflict with the findings of fact, that "[f]our appellees have *de facto* religious restrictions on the admission of students...." Appellants' Brief, p. 66. To support that assertion with respect to Loyola College, appellants state that "[t]he major 'feeder' schools for Loyola College are Catholic high schools in the Baltimore metropolitan area; and the college continues to recruit at such schools." *Id.* at 68. Appellants conveniently ignore the undisputed evidence that representatives of Loyola's Admissions Office visit and recruit students at *every* high school in the State of Maryland except trade and vocational schools. Tr. 1324-25. Loyola can apparently avoid the charge of religious discrimination leveled by the appellants only by excluding all Catholic high schools from a recruiting program specifically designed to reach every high school in Maryland.

Finally, appellants make the wholly unsupported assertion that "the evidence plainly demonstrates that the advancement of religion . . . is a substantial activity or purpose of each institution." Appellants' Brief, pp. 46-47. To substantiate that claim, appellants simply reference other pages in their brief. The only arguable support in the pages referenced is the further assertion that "[f]acts demonstrating the extent and intensity of religiosity at these institutions are offered throughout this brief, the 'Appendix to Plaintiffs' Brief' filed below . . . and plaintiffs' proposed findings of fact." *Id.* at p. 20. Thus, the only "authority" appellants can cite for a "factual" claim that is central to their constitutional argument is their own distorted view of the evidentiary record.

Arrayed against the appellants' bald assertion are the carefully delineated findings of the court below on the scope of religious activity at the appellee institutions. J.S. App., pp. A-44 to A-45. Although the court found that each appellee college has the secondary objective of encouraging the spiritual development of students, it also found that "at none of these institutions does this encouragement go beyond providing the opportunities or occasions for religious experience." J.S. App., p. A-45. Such a low-key approach to religious activity hardly amounts to the advancement of religion as a "substantial purpose and activity." Indeed, that claim is particularly inappropriate with respect to Mount Saint Mary's College where less than one percent of the total budget is spent on religious activities. Tr. 924-25.

Evidentiary distortions and misstatements are so pervasive in the appellants' brief that they necessarily

undermine the validity of the factual assumptions of their constitutional argument. Whether those distortions and misstatements are the product of partisan myopia or excessive adversary zeal, it is important to recognize that they are absolutely essential to appellant's Establishment Clause argument. For the success of that argument rests on appellants' ability to persuade this Court that there are no meaningful differences between the appellee colleges and the parochial schools ruled ineligible for public aid in *Lemon* v. *Kurtzman, supra, Committee for Public Education* v. *Nyquist, supra,* and *Meek* v. *Pittenger, supra.* The findings of fact in this case are a complete answer to that contention. Those findings portray educational institutions that bear no resemblance to the parochial schools described in *Lemon* and *Nyquist.* Thus, when appellants' brief is stripped of its discredited factual underpinnings, their legal argument collapses under its own weight.

A. Excessive Entanglement

The core of the appellants' entanglement argument is the differences they perceive between the aid program they challenge and the aid program sustained in *Tilton.* The fatal flaw in that argument is that it rests on purported differences either that do not exist or that have no constitutional significance.

Of equal significance is an unstated premise of appellants' argument—namely, that the program of construction grants upheld in *Tilton* carried government to the brink of constitutional invalidity and that any higher education aid program that is broader in scope must fall under the entanglement doctrine. But *Tilton* cannot be read so narrowly. That decision set down general principles for evaluating the constitutional

validity of public aid programs that benefit church-related colleges. *Tilton* in no sense limited permissible aid to construction grants. For that reason, demonstrating that differences exist between the aid program challenged here and the aid program sustained in *Tilton* is not sufficient. What appellants must show is that those differences will engender the evils that the entanglement doctrine seeks to prevent. The appellants have failed to make such a showing.

1. Character of the Appellee Colleges

Appellants grudgingly acknowledge that the court below found that the appellee colleges are virtual mirror images of the *Tilton* colleges. Appellants' Brief, p. 19. Yet they insist on attempting to portray the appellee colleges as being little different from the parochial schools involved in the *Lemon* case.

> "Although the appellee institutions have certain characteristics of the *Tilton* schools, they also have characteristics of the *Lemon* schools." *Id.* at p. 20.

The basis upon which the appellants attempt to distinguish the appellee colleges from the *Tilton* colleges belies the validity of the comparison they attempt to make.

Appellants assert that there are "[a] number of distinctions between the *Tilton* institutions, *as reflected in this Court's opinion,* and the appellee institutions." *Id.* at p. 21 (emphasis added). But attempting to compare the appellee and *Tilton* colleges by comparing the entire evidentiary record in this case with the facts recited in the *Tilton* opinion is wholly invalid. This Court's opinion in *Tilton* did not undertake to recite

or even summarize all of the evidence at the trial of this case.[53] That opinion simply isolated and summarized those parts of the trial record which it viewed as relevant to the constitutional issues decided in *Tilton.* Record facts not discussed were obviously considered constitutionally irrelevant. For example, the appellants assert that "[t]he daily opportunities for worship offered by the colleges here are limited to Roman Catholic religious services." *Id.* at p. 21. The full evidentiary record in *Tilton* discloses that the opportunities for religious worship at the four *Tilton* colleges were likewise limited to Roman Catholic religious services.[54] The absence of any reference to that fact in the *Tilton* opinion simply indicates that this Court did not view that fact as constitutionally relevant. What was relevant was that attendance at religious services at the *Tilton* colleges was purely voluntary. 403 U.S. at 686. The court below made the same findings with respect to the appellee colleges, J.S. App., p. A-44, a finding that the appellants do not and cannot challenge.

The court below expressly ruled that the appellee colleges "have been found to conform closely to the colleges approved in *Tilton* v. *Richardson, supra.*" J.S. App., pp. A-10 to A-11. Appellants have provided no credible basis for contesting that explicit finding. Thus, there is no greater risk that the aid to the appellee colleges will pose a risk of excessive entangle-

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[53] The district court in the *Tilton* case heard testimony from 22 witnesses and received 155 documents in evidence. Brief of Appellee Colleges and Universities, p. 6, *Tilton* v. *Richardson, supra.*

[54] Appendix to Brief of Appellee Colleges and Universities, pp. 6a-7a, 11a, 17a, 22a, *Tilton* v. *Richardson, supra.*

ment than this Court found with respect to the *Tilton* colleges.

2. Nature of the Aid

In seeking to show that the aid program they challenge is unconstitutionally broad in scope, the appellants have resorted to an adjectival argument, substituting labels for analysis. For example, appellants rely on the *Tilton* decision for the proposition that the state may "provide church-related schools with secular, neutral or nonideological services, facilities, or materials." Appellants' Brief, p. 23. At the same time, the appellants claim that the Maryland aid program is "virtually undefined in scope," *id.* at p. 32, implying that it is therefore not ideologically neutral. But adjectives, like metaphors, are a shaky foundation for constitutional analysis. *Cf. McCollum* v. *Board of Education,* 33 U.S. 203, 247 (1948) (Reed, J., dissenting).

The appellants' characterizations notwithstanding, there is nothing ideological about the aid provided under the Maryland program. The state simply gives monetary grants to private colleges and universities, and there is nothing ideological about money. Furthermore, the aid provided is in no sense undefined in scope. The enabling legislation specifically prohibits grant recipients from using their grants for sectarian purposes, a restriction that is mandated by the Establishment Clause.

The appellants' complaint appears to be that colleges receiving the aid have wide latitude in deciding how to use it. But the existence of that latitude does not, by itself, give the aid an ideological coloration. The aid acquires a prohibited ideological coloration only if it is used for religious purposes by colleges receiving it. At root, the so-called ideological character of the aid depends on the intensity of the religious character of colleges receiving the aid. Since the appellee colleges are no more religious in character than the *Tilton* colleges, the aid provided here is no more ideological than the aid sustained in *Tilton*

Appellants, however, resort to the decisions in *Lemon* v. *Kurtzman, supra,* and *Levitt* v. *Committee for Public Education,* 413 U.S. 472 (1973), to argue that the aid program they challenge has a prohibited ideological character. Appellants' Brief, pp. 30-32. Noting that recipient colleges can use the Maryland aid to pay faculty salaries, including the salaries of faculty members who happen to be members of the clergy, appellants contend that *Lemon* and *Levitt* absolutely prohibit such use of public aid. That simplistic argument ignores the basis for the holdings in *Lemon* and *Levitt* and the clear constitutional line this Court has drawn between the higher and lower levels of church-related education.

The teacher salary aid programs at issue in *Lemon* were struck down because of the educational environment in which parochial school teachers function. This Court noted that the typical parochial school teacher "is employed by a religious organization, subject to the direction and discipline of religious authorities, and works in a system dedicated to rearing children in a particular faith." 403 U.S. at 618. It is only when those circumstances exist that using public funds for faculty salaries at church-related schools is constitutionally suspect. None of these circumstances exist at the appellee colleges.

Faculty members at the appellee colleges are employed not by "religious organizations" but by auto-

nomous educational institutions duly chartered and incorporated under the laws of the State of Maryland. *Cf. Bradfield* v. *Roberts,* 175 U.S. 291 (1899); *Speer* v. *Colbert,* 200 U.S. 130 (1906). Those faculty members are not "subject to direction and discipline of religious authorities" but fulfill their teaching obligations in an atmosphere of unfettered academic freedom. Indeed, the court below expressly found that faculty members at the appellee colleges "feel no religious pressures, by anyone, on their classroom presentation or their selection of texts and course materials." J.S. App., p. A-38. That finding is supported by considerable and undisputed evidence presented by these appellees that their faculty members come from a variety of religious backgrounds and expose their students to viewpoints that conflict with the officially adopted positions of the Roman Catholic Church. See J.S. App., pp. A-38 to A-39. Finally, those faculty members do no work "in a system dedicated to rearing children in a particular faith" but at educational institutions whose predominant goal is to provide a sound, secular education for their students. Thus, none of the conditions that raised the spectre of excessive entanglement in connection with teacher salary aid in *Lemon* exists here if the defendant colleges use public funds for faculty salaries.

Appellants also contend that "[t]he payment of state aid to clerics who are teachers strikes directly at the root of the establishment clause." Appellants' Brief, p. 31. Appellants rely on a brief excerpt from the *Nyquist* opinion for that sweeping misstatement of the law. *Id.* at pp. 31-32. The Court's reference in *Nyquist,* as in prior decisions,[55] was to the struggle in Virginia in 1785-1786 over a bill to pay the salaries of

[55] *E.g., Everson* v. *Board of Education,* 330 U.S. 1, 11-13 (1947).

ministers acting in their capacities as ministers. Nothing in the decided cases bars teachers who happen to be clergymen from sharing in public benefits available to teachers generally. The only issue is whether the individual is being paid for his activities as a teacher rather than as a clergyman.[56] Indeed, clergymen have in the past drawn, and continue today to draw, salaries from public funds without even the suggestion of constitutional difficulty. From our earliest days, clergymen have served in the state and federal legislatures and have been paid for their services with public funds.

Thus, there is no basis for appellants' sweeping assertion that the Maryland aid program is invalidly ideological in character. That aid program is concededly broader in scope than the aid programs approved in *Tilton* and *Hunt.* But the broader scope of the aid program does not make it ideological in character. Appellants have gone to great lengths to demonstrate the differences between the Maryland aid program and the *Tilton* and *Hunt* programs without showing that those differences have any constitutional significance.

3. Resulting Administrative Relationships

The appellants' contention that the administration of the Maryland aid program will unconstitutionally entangle state officials in the religious affairs of the appellee colleges is in direct conflict with the findings of fact entered by the court below. J.S. App., p. A-49.

[56] In fact, there is no absolute constitutional bar against government paying the salaries of clergymen to act in their ministerial roles. Each house of Congress has a chaplain whose salary is paid with public funds. Military and prison chaplains likewise are on the public payroll.

That contention also rests on some serious misconception about the basis for the entanglement rulings in *Tilton* and *Lemon*.

The first of those misconceptions is the appellants' apparent assumption that the mere existence of an ongoing relationship between public officials and church-related institutions is barred by the entanglement doctrine. This Court laid that assumption to rest in *Lemon* when it noted that "[s]ome relationship between government and religious organizations is inevitable." 403 U.S. at 614. It is only those relationships that enmesh government in the religious affairs and activities of religious organizations that are constitutionally suspect. Thus, simply listing the points of contact between state officials and the appellee colleges, as the appellants have done at pages 39-41 of their brief, proves nothing. Appellants have failed to make the critical showing that those contacts have involved or will involve state officials in the religious affairs and activities of the appellee colleges.

The appellants' second misconception is their belief that the type of administrative supervision required under the *Lemon* and *Tilton* aid programs was significantly different. In both cases, the aid supported the classrooms or the classroom instruction at church-related schools, and full and vigorous enforcement of the restriction against sectarian use of the aid in both cases would have required government surveillance of classrooms. Because this Court believed that the instruction in parochial schools involved a blending of the religious with the secular, the Court feared that government surveillance of parochial school classrooms would inevitably entangle public officials in religious matters. But because the Court found that the instruc-

tion at church-related colleges has an inherent secular integrity, the *Tilton* entanglement holding rested on the assumption that classroom surveillance would be unnecessary and, if conducted, would not involve public officials in religious matters. Thus, the contrasting results in *Lemon* and *Tilton* are explained not by any difference in the administrative supervision required under the aid programs but by the substantial differences in educational processes at the lower and higher levels of church-related education. Because the appellee colleges have the essential characteristics of the *Tilton* colleges, the potential for administrative entanglement with religion is as minimal under the Maryland aid program as it was in *Tilton*.

Perhaps the most serious defect in the appellants' argument is their attempt to obscure the realities of the administration of the Maryland program. The relationship that exists between the Maryland Council and the appellee colleges is essentially a "paper" relationship. The principal enforcement machinery is information supplied by the colleges at the time they apply for grants and at the time they report on how the grants were used. There is no evidence that classroom inspection or surveillance has been conducted or will be necessary for effective enforcement of the sectarian use restriction. And the appellants have made no showing that the limited relationships that exist under the aid program will be inadequate to enforce that restriction. Indeed, the court below explicitly found that the existing enforcement machinery will be effective and non-entangling. J.S. App., pp. A-47 to A-49. That machinery has been deliberately structured to avoid the type of entanglement the Establishment Clause prohibits, and the court below concluded that the

Maryland Council has successfully navigated the channel between ineffective and excessive enforcement.

> "The Council has shown no indication to enmesh itself *unnecessarily* in the recipients' affairs. The Act does not require administrative entanglement, there is no entanglement in the present procedures, and no cause to speculate that the Council will redefine its responsibilities to create a problem in the future." J.S. App., p. A-49 (emphasis added).

Thus, the appellants' contention that the Maryland aid program has created or has the potential for creating unconstitutional government entanglement with religion lacks any evidentiary or analytical support.

4. Political Entanglement

This Court has suggested in dicta that aid programs benefiting church-related schools might be constitutionally invalid if they have the potential for creating political divisiveness along religious lines.[57] The appellants make the rather incredible assertion that the Maryland aid program contains the potential for such political entanglement. The sole support they can marshall for that assertion is that "at least one college president, who is a Jesuit priest, has already advocated aid to private colleges 'in the political arena.'" Appellants' Brief, p. 45. The person to whom they refer is Rev. Joseph A. Sellinger, S.J., the President of Loyola College. Father Sellinger is also a duly appointed member of the Maryland Council for Higher Education and he expressed his support for aid to private colleges in that capacity at an official meeting of the Maryland Council. SDX-4.

[57] *Meek* v. *Pittenger, supra,* 43 U.S.L.W. at 4603; *Lemon* v. *Kurtzman, supra,* 403 U.S. at 622-24; *Committee for Public Education* v. *Nyquist, supra,* 413 U.S. at 794-98.

Appellants' reliance on Father Sellinger's statement to support their political entanglement argument is bizarre in several respects. First, there is nothing religious or potentially divisive about advocating aid for *private* colleges, irrespective of the arena in which the advocacy is conducted. Second, appellants are suggesting that Father Selinger must curb his advocacy of aid to private colleges or risk placing any such program in consitutional jeopardy. Finally, the logical extension of appellants' argument is legislation becomes constitutionally suspect if it has the vocal support of persons who happen to be clergymen. Would the appellants contend that the Civil Rights Act of 1964 is unconstitutional because it was strongly advocated "in the political arena" by Dr. Martin Luther King and other prominent clergymen?[58]

It is somewhat disturbing to find these appellants, who purport to be championing civil liberties in this litigation, suggesting that those who have the status of clergymen must forego their First Amendment rights of free speech and to petition government for a redress of grievances if they expect legislation they support to pass constitutional scrutiny. The appellants have carried the political entanglement doctrine to the extreme of advocating the very religious intolerance that the Establishment and Free Exercise Clauses were designed to guard against.

[58] See J. Choper, *The Establishment Clause and Aid to Parochial Schools,* 56 Calif. L. Rev. 260, 273, 277 (1968).

B. Primary Effect

The court below, after a careful review of the evidentiary record, found explicitly that "the primary effect of aid to [the appellee colleges] is not to advance religion." J.S. App., p. A-43. Nevertheless, appellants argue at considerable length in their brief that, in six different respects, the Maryland aid program has a constitutionally invalid primary effect. In the process, appellants refuse even to acknowledge the primary effect finding entered below and the evidentiary support for that finding. The bases upon which the appellants would have this Court disregard the carefully considered finding on that issue are totally lacking in factual and legal substance.

1. Restrictions Against Sectarian Use

Appellants make a two-pronged argument to support their contention that the challenged aid program has an invalid primary effect because it contains inadequate safeguards to prevent public funds from being used for religious purposes. First, they itemize certain uses which recipient colleges can make of their grants, implying that those uses are necessarily religious in nature. Second, they seek to show gaps in the administration of the aid program which they contend will produce ineffective enforcement.

Initially, it must be reiterated that the Maryland aid program contains the one restriction that is constitutionally mandated—namely, that no public funds received by a college can be used for "sectarian purposes." J.S. App., p. A-54. That prohibition is as broad in its scope as comparable provisions in the aid programs upheld in *Tilton* and *Hunt*. Thus, the Maryland program clearly satisfies one of the essential

constitutional requisites under the primary effect doctrine.

The appellants, however, emphasize that the Maryland program does not prohibit the use of public funds for faculty salaries, scholarships and building maintenance and repair. Appellants' Brief, pp. 50-55. But none of those uses of public funds is inherently sectarian in nature. Appellants invite a contrary conclusion by relying on decisions of this Court that are inapposite.

The asserted invalidity of using public funds to pay faculty salaries is drawn from the decision in *Lemon* v. *Kurtzman, supra.* But, as this brief has already demonstrated, such a use of public funds is barred only when faculty members teach in an educational environment comparable to that of the parochial schools involved in the *Lemon* case. No such environment exists at the appellee colleges, and the *Lemon* ruling on faculty salaries simply does not apply to this case. To the extent that some faculty members at the appellee colleges might be involved in sectarian, rather than secular, activities, the prohibition against sectarian use of grant funds would prohibit the payment of their salaries with those funds.

The plaintiffs rely solely on *Committee for Public Education* v. *Nyquist, supra,* in contending that an invalid primary effect is generated when grants are used for building repair and maintenance. Appellants' Brief, pp. 53-55. But *Nyquist* dealt with that form of aid in the parochial school context, and the ruling in that case was based on two considerations absent from this case. First, the Court found that it was impossible in the parochial schools to isolate facilities used for

secular purposes from those used for religious purposes. 403 U.S. at 774. Second, nothing in the New York program barred the use of public funds for the repair and maintenance of chapels and other religious facilities. *Id.* The court below expressly found that secular and religious activities are clearly separable at the appellee colleges. J.S. App., p. A-19. In addition, the prohibition against sectarian use of grant funds imposes the very restriction in this case that was absent in *Nyquist*.

Appellants also rely on *Nyquist* to argue that the use of public funds by the appellee colleges for scholarships is barred by the primary effect doctrine. But the same day that *Nyquist* was decided this Court refused to review a decision upholding an analogous program of aid to higher education.[59] *Durham* v. *McLeod*, 192 S.E. 2d 202 (1972), *appeal dism'd for want of substantial federal question*, 413 U.S. 902 (1973). Again, this Court has perceived qualitative differences between the higher and lower levels of church-related education that appellants apparently cannot comprehend. Appellants also contend that the use of funds provided under the Maryland program for scholarships is constitutionally defective because one of the appellee colleges employs religious considerations in awarding scholarships. It should be emphasized that no religious considerations enter the scholarship decisions at Loyola College, the only appellee that has made such

[59] The *Durham* case involved a program of loans to college students to help them meet their college expenses, and not scholarships. But the practical effect of that loan program is the same as a scholarship program. In each case, funds provided by the state are passed through the conduit of students to church-related colleges which may use those public funds to meet their general educational expenses.

use of its state funds. But, if an institution's imposition of religious qualifications on scholarship awards constitutes a sectarian use of public funds allocated to scholarships, the prohibition against sectarian use of those funds in the Maryland program would bar such an institution from using its grants for scholarships.

Finally, appellants contend that the administrative machinery is ineffective to prevent a sectarian use of funds awarded to the appellee colleges. But that contention is based solely on appellants' perception of what constitutes effective enforcement and not on the practical or constitutional considerations that are controlling. The appellants, for example, are disturbed because special inquiries would not be made if the Maryland Council learned that a grant was being used in part to pay the salary of a faculty member who happened to be a clergyman. But the Maryland Council does not sacrifice effective enforcement if it does not share appellants' biased distrust of the professional competence of academicians who also happen to be clergymen. Indeed, the several enforcement procedures that appellants suggest are constitutionally mandated but lacking would be necessary only if the Maryland Council shared their inbred suspicion of the academic integrity of the educational processes at the appellee colleges. But the Maryland Council's expert knowledge of the appellee colleges, reinforced by the essentially secular educational programs conducted by those institutions, makes clear that those suspicions are completely unfounded. For that reason, the enforcement machinery for administering the Maryland program has been structured to comport with the realities of the educational processes at the appellee colleges and the constitutional admonition against excessive government entanglement with the religious affairs of church-related institutions. The

findings entered by the court below clearly establish that the Maryland program contains sufficient prohibitions, and adequate machinery to enforce those prohibitions, to assure that grants awarded the appellee colleges will not advance religion. The Establishment Clause demands nothing more.

2. Classroom Prayers

Appellants cite the familiar cases of *Engel* v. *Vitale,* 370 U.S. 421 (1962), and *Abington School Dist.* v. *Schempp,* 374 U.S. 203 (1963), for the undisputed proposition that government cannot conduct prayers or devotional bible reading in public schools. Appellants' Brief, pp. 57-61. Appellants rely on that proposition to support their argument that government is barred from providing funds to any institution at which prayers are recited in the classroom. *Id.* at 61-63. Because a few faculty members at the appellee colleges start some classes with a prayer, appellants contend that aid to those colleges necessarily has the primary effect of advancing religion. That argument lacks any evidentiary or legal substance.

In the first place, appellants' argument rests on a fallacious assumption—namely, that the state is "financing religious worship" when it provides funds to a college at which prayers are recited in some classrooms. *Id.* at p. 62. There is no evidence in this record of this case, and none cited by the appellants, to show that any funds awarded under the Maryland aid program have been used to finance classroom prayers. Any such use of those funds is absolutely prohibited. Thus, there is no evidentiary basis for the appellants' argument.

Of greater significance are the invidious implications of that argument, which proceeds on an unstated premise—namely, that the mere receipt of public funds by private colleges transforms their actions into state action and subjects them to the same restraints that government must observe in the operation of public schools. In effect, appellants contend that private colleges receiving public funds must behave in all respects like public colleges or be forever barred from sharing in public educational programs. Because the serious financial plight of private colleges makes some public aid essential to their survival, appellants would require that all distinctions between private and public colleges be obliterated or would relegate the private sector of higher education to certain extinction. No decision of this Court requires that drastic result.

The *Engel* and *Schempp* decisions are simply irrelevant to any issue in this case. Those cases dealt solely with Establishment Clause limitations on governmental power in the operation of *public* schools. The First Amendment, like the Fourteenth Amendment, restrains only governmental action and its provisions cannot reach purely private action. There are only two narrowly circumscribed circumstances in which apparently private action is subject to the restraints of the First and Fourteenth Amendments. The first is when a private entity is performing an essentially governmental function. *E.g., Evans* v. *Newton,* 382 U.S. 296 (1966); *Marsh* v. *Alabama,* 326 U.S. 501 (1946). The second is when government is so deeply involved in the activities of a private entity that the private entity could not continue to function without governmental sanction. *E. g., Moose Lodge* v. *Ivis,* 407 U.S. 163 (1972); *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961). But no case has ever held that the mere receipt of public funds by a private entity is sufficient to transform its actions into

state action subject to the restraints of the First and Fourteenth Amendments. Yet, appellants' argument based on the classroom prayer practices of the appellee colleges requires such a holding.

Finally, appellants attempt to obscure the scope of the classroom prayer practice at these appellee colleges. The court below explicitly found that, "[at] Loyola and Mount Saint Mary's, the percentage of classes which start with a prayer is miniscule." J.S. App., p. A-38. It further found that appellants "failed to establish that beginning a class with prayer in any way diminishes the atmosphere of intellectual freedom which marks these colleges." *Id.* at pp. A-39 to A-40. And, as already noted, appellants have been unable to cite any evidence to show that either college used any portion of its state grants to finance the classroom prayer practice. It should also be noted that neither of these appellees has any institutional policy with respect to encouraging classroom prayers. J.S. App., p. A-39. To the extent that a very few faculty members engage in that practice, "[i]t is treated as a facet of the instructor's academic freedom." *Id.* Thus, even if appellants' argument had some legal support, there would be no evidentiary basis for concluding that aid to these colleges has the primary effect of advancing religion solely because a miniscule number of classes start with a prayer.

3. Religious Discrimination in Admissions and Hiring

Appellants assert as though it were an established and undisputed fact that the appellee colleges have *de facto* religious restrictions on student admissions and practice religious discrimination in faculty hiring. Both assertions directly contradict the explicit findings of fact by the court below on those two issues.

Appellants appear to suggest that the court below somehow overlocked their argument on *de facto* religious restrictions on admissions and the evidence that purportedly supports it. That is simply not the case. The court below specifically stated that "*thorough analysis of the student admission and recruiting criteria* demonstrates that the student bodies are chosen without regard to religion." J.S. App., p. A-44. Since appellants' argument of *de facto* religious restrictions on admissions focuses on the recruiting practices of the appellee colleges, it is obvious that the court below considered and rejected that argument. Indeed the evidence cited in appellants' brief to support that argument is identical to the evidence they attempted to marshall in the court below to support an identical argument.

Similarly, the court below found that appellants failed to produce any evidence to show that religious considerations enter the faculty hiring decisions at the appellee colleges. J.S. App., p. A-41. Nevertheless, appellants persist in contending that "[t]hree appellees have the policy or practice of at least partially restricting faculty appointments based on religion." Appellants' Brief, pp. 64-65. That contention will not withstand analysis.

First, it should be noted that, with respect to these appellees, the charge of religious discrimination is made only against Loyola College. No such claim is made with respect to Mount Saint Mary's College and none could in light of the express finding that "[a]t . . . Mount Saint Mary's, no inquiry is made into an applicant's religion." J.S. App., p. A-40.

The allegations of religious discrimination made against Loyola are based on the college's policy of seeking to attract academically qualified members of two religious orders to its faculty. Appellants' Brief, pp. 65-66. Loyola College does not dispute that such a policy exists. Loyola does, however, dispute the inference that appellants seek to draw from that policy—namely, that it imposes religious restrictions on hiring. Appellants can point to no evidence showing that a qualified lay person, no matter what his or her religion, has been rejected for a faculty position because of that policy. Indeed, the evidence contradicts any such inference. Appellants note, for example, that Loyola would like to have two Jesuits in its Philosophy Department. *Id.* at p. 66. The chariman of that department, however, testified unequivocally that he will hire no person because he is a Jesuit. His sole hiring criteria is academic competence. Tr. 1407-08. He also noted that he had hired no Jesuits during his tenure as department chairman. Tr. 1404-05. Moreover, the evidence clearly establishes that members of religious orders who apply for faculty positions at Loyola must compete with lay persons and that hiring decisions are based solely on academic competence. Tr. 1275-86.

Thus, the charges of religious discrimination leveled by appellants at these appellees find support only in appellants' myopic and highly selective reading of the evidence. Those charges are totally refuted by the findings of fact entered by the court below.

4. Appellants' Other Primary Effect Arguments

Appellants' other primary effect arguments are based on their characterizations of how theology is taught at the appellee colleges and the totally unsupported

assertion that the appellee colleges are "sectarian institutions." As this brief has already demonstrated,[80] appellants' claim that these appellees teach theology in a sectarian fashion rests on isolated pieces of testimony wrenched from their evidentiary context. The court below specifically refrained from making any finding that theology is taught at the appellee colleges in a sectarian fashion, J.S. App., p. A-50 n.9, and appellants have failed to marshall any credible evidence to support the finding that the court below refused to make. Moreover, the court below has construed the sectarian use restriction in the Maryland program in a manner that prohibits recipient colleges from using grant funds to support their theology or religion departments. *Id.* at pp. A-12 to A-13. Therefore, there is no longer even a possibility that public funds will support the teaching of theology at the appellee colleges.

Appellants' claim that the appellee colleges are "sectarian institutions" ineligible to receive public funds is based on a bald assertion without any semblance of evidentiary support. Appellants' Brief, pp. 74-75. The total answer to that assertion is the conclusion of the court below that the appellee colleges "conform closely to the colleges approved in *Tilton* v. *Richardson.*" J.S. App., pp. A-10 to A-11. Since the *Tilton* colleges were ruled eligible to receive public funds, colleges with the same characteristics obviously cannot be ineligible sectarian institutions.

C. Facial Unconstitutionality

Appellants alleged in their complaint that the authorizing legislation for the Maryland aid program is unconstitutional both on its face and as applied. J.A.

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[80] See pp. 61-63, *supra*.

9. Appellants draw no such distinction in their brief. They conclude their discussion of each of the constitutional defects they perceive in the Maryland program with the assertion that the challenged statute is unconstitutional. *E.g.,* Appellants' Brief, pp. 48, 57, 63. Appellants are clearly asking this Court to strike down the entire Maryland program if it agrees with any of their arguments. No such relief can be justified in this case.

The appellants' arguments are premised on their allegations that one or more of the appellee colleges engage in practices that render aid to them constitutionally invalid. But the appellee colleges are not the sole beneficiaries of the Maryland aid program. Grants under the program have been awarded to 18 colleges and universities. J.S. App., p. A-37 n.2. No question has been raised in this appeal concerning the eligibility of institutions not parties to the appeal to continue receiving public funds. Thus, there can be no justification for striking down the entire aid program on the basis of isolated practices at one or more of the appellee institutions.

Moreover, the Maryland General Assembly anticipated that particular grants might be ruled invalid or that particular colleges might be held legally ineligible to receive grants. To guard against that possibility, the General Assembly included in the authorizing legislation a severability clause which provides:

> "If any parts of this subtitle, or any particular payments or payments to any particular types of institutions pursuant to this subtitle, shall be held to be unconstitutional or invalid for any reason, such unconstitutionality or invalidity shall not affect the remaining parts of this subtitle, and shall not affect any other payments or payments to any other types of institutions pursuant to this subtitle, the General Assembly hereby declaring that it would have enacted the remaining parts of this subtitle or would have authorized the remaining payments or payments to remaining types of institutions, if such unconstitutionality or invalidity had been known; and to this end, all parts, sections, and parts of sections of this subtitle, and all administrative actions pursuant to this subtitle, are declared to be severable." J.A. 14-15.

This court's decisions make clear that such severability provisions must be respected as long as the portions of the statute that are invalidated do not defeat the legislative purpose in enacting the statute. *E.g., Champlin Rfg. Co.* v. *Commission,* 286 U.S. 210, 234 (1932); see *Sloan* v. *Lemon,* 413 U.S. 825, 833-34 (1973). That same principle applies even in the absence of a severability clause. *Tilton* v. *Richardson, supra,* 403 U.S. at 682-84.

In the context of this case, this Court would be justified in striking down the entire Maryland aid program only if a "substantial majority" of the colleges benefiting from the aid were constitutionally ineligible to receive public funds. *Sloan* v. *Lemon, supra,* 413 U.S. at 833-34. Since the eligibility for public aid of a "substantial majority" of the colleges benefiting from this aid program is unchallenged, the severability clause must be respected and the appellants must be denied the declaration of facial unconstitutionality they seek.

The distinctions that must be drawn between the appellee colleges and the non-party institutions must also be drawn among the appellee colleges. A practice or practices that may render one appellee college ineligible for public aid cannot be the basis for denying

aid to the other appellees that do not engage in such a practice or such practices. For example, appellants claim that three of the appellee colleges practice religious discrimination in hiring. Assuming, *arguendo,* that those claims are supported by the record and that such a practice is sufficient to render a college ineligible for public aid, the eligibility status of only those three colleges would be affected.[61]

A similar analysis is required with respect to appellants' entanglement argument. If the Court concludes that one of the appellee colleges has such a pervasive religious character that administrative supervision of aid to that college would create the risk of excessive entanglement, the only appropriate remedy would be to declare that college ineligible to participate in the aid program. Neither the eligibility of the other appellee colleges for aid nor the facial validity of the statute should be affected by such a ruling.

By seeking a declaration of facial unconstitutionality in this appeal, appellants are asking this Court to approach the case with a meat axe rather than the scalpel that is required in First Amendment adjudication. The *Tilton* decision clearly requires that the eligibility of each college be evaluated separately, 403 U.S. at 682, and that severability clauses be respected.

IV.

REPAYMENT OF GRANT FUNDS

In addition to the injunctive relief they seek, appellants ask this Court to order the appellee colleges to repay to the state all grant funds awarded them since

[61] That precise approach was taken by the district court in *Americans United* v. *Bubb,* 379 F. Supp. 872 (D. Kan. 1974).

this litigation was initiated.[62] Appellants recognize, as they must, that the repayment issue is governed by the decision in *Lemon* v. *Kurtzman,* 411 U.S. 192 (1973) (*Lemon II*), and the equitable principles it enunciated. The Court observed in *Lemon II* that, "in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is equitable." 411 U.S. at 200. These appellees submit that ordering repayment of the grant funds they have received is not necessary to preserve the constitutional principles at issue in this case and would be neither fair nor equitable.

In *Lemon II,* this Court permitted the Pennsylvania parochial schools to receive payment of some $24 million in public funds *after* it had ruled the Pennsylvania aid program unconstitutional. At the heart of that ruling was the Court's reluctance to have the validity of state action turn on subsequent federal court rulings.

> "Appellants ask, in effect, that we hold those charged with executing state legislative directives to the peril of having their arrangements unraveled if they act before there has been an authoritative judicial determination that the governing legislation is constitutional. Appellants

[62] The grants appellants want to have repaid are described as "all payments not enjoined upon timely filed motions or applications." Appellants' Brief, p. 76. Excluded from the relief appellants seek, therefore, are the grants paid the appellee colleges in the first year of the Maryland program's operation. Those grants were paid before appellants initiated this litigation and were not subject to "timely filed motions or applications." The court below ruled that those grants need not be repaid even though it also found that those grants were paid at a time when the Maryland program was unconstitutional on its face. J.S. App., pp. A-23 to A-25.

> would have state officials stay their hands until newly enacted state programs are 'ratified' by the federal courts, or risk draconian, retrospective decrees should the legislation fall. In our view, appellants' position could seriously undermine the initiative of state legislators and executive officials alike." 411 U.S. at 207-08.

Those policy considerations, reinforced by the equitable principles applied in *Lemon II,* require that appellants be denied the repayment relief they seek.

The repayment issue in this case is distinguishable from the question decided in *Lemon II* in only one respect. The Court noted in that case that the appellants had not sought injunctive relief pending appeal even though the Pennsylvania aid program continued to operate while the appeal was pending. 411 U.S. at 196-97. Here, appellants sought and were denied an injunction pending appeal by the district court and by this Court after the favorable ruling below and after the state announced its intention to pay escrowed grant funds to the appellee colleges. But that distinction is not determinative.

The decision in *Lemon II* suggests three factors are controlling in determining whether repayment should be ordered in this case. First, would any constitutional evils that this Court perceives in the Maryland program accrue if repayment is not ordered? See 411 U.S. at 201-03. Second, have the appellee colleges relied to their detriment on their right to receive and spend the grant funds now challenged? See 411 U.S. at 203-06. Third, should any ruling of unconstitutionality by this Court have been clearly foreshadowed so that the state could be considered to have acted in bad faith in paying grant funds to the appellee colleges pending appeal? See 411 U.S. at 206-07.

Repayment can be ordered, of course, only if this Court concludes that the Maryland aid program fails to satisfy the primary effect or excessive entanglement branches of the governing Establishment Clause test. Failure to order repayment will not threaten any constitutional values embodied in that test. The primary effect doctrine seeks to prevent the use of public funds for religious purposes. Continued administrative supervision of the use of grant funds by the appellee colleges while this appeal is pending substantially reduces, if not eliminates, the risk of any religious use of those funds. Similarly, the risk of excessive entanglement will be eliminated by any ruling of unconstitutionality by this Court. All administrative supervision of grants already paid will have been completed by the time this Court rules, and its holding of unconstitutionality will foreclose any arguably invalid state involvement with the appellee colleges in the future.

There can be no question that the appellee colleges have relied to their detriment on their right to receive and spend the grants at issue. The evidence clearly establishes that private colleges and universities face serious financial problems and that the challenged aid program was designed to alleviate those problems. J.S. App., pp. A-37 to A-38. But, because they were named as defendants in this litigation, the appellee colleges were forced to forego public aid for almost three years. Payment was made to them only after the court below ruled that the aid program was constitutional and after the court below and this Court denied injunctions against that payment pending appeal. Under those circumstances, the appellee colleges were entitled to rely on their right to spend the ac-

cumulated grant funds on their pressing educational needs without the risk of repayment, especially since the court below had ruled that they need not repay grants they had received while the aid program was unconstitutional. J.S. App., pp. A-23 to A-25.

Finally, any ruling of unconstitutionality will not have been foreshadowed by any prior decisions of this Court. The decisions in *Tilton* v. *Richardson, supra,* and *Hunt* v. *McNair, supra,* suggest that any such ruling will be a departure from prior decisions. The sharp constitutional line that recent Establishment Clause decisions have drawn between aid to the higher and lower levels of church-related education can fairly be read to have created a presumption of validity for programs of aid to private higher education. Moreover, the state officials here voluntarily withheld payments from the appellee colleges until the court below applied *Tilton* and *Hunt* to this case and found that the appellee colleges closely conformed to the colleges ruled eligible for public funds in *Tilton.*

These considerations clearly demonstrate that repayment of grant funds by the appellee colleges is not necessary to preserving constitutional values and would not be fair and equitable. The only countervailing consideration that appellants can offer is their assertion that repayment is the "only effective redress" for the violation of constitutional rights they perceive. Appellants' Brief, p. 79. Even if it is assumed that payment of public funds to the appellee colleges has offended constitutional principles, that intangible harm to appellants hardly rises to the level of the tangible financial damage the appellee colleges will suffer by repayment. The injunctive relief appellants seek is more than sufficient redress for the constitutional rights they seek to vindicate. Thus, even if this Court rules that the Maryland aid program is constitutionally defective, the balance of equities requires that appellants be denied the repayment relief they seek.

Appellants contend, however, that failure to order repayment in this case will encourage states to enact and implement aid programs of "dubious constitutionality." *Id.* at p. 80. That hypothetical fear finds no support in the record of this case. The state officials here voluntarily withheld all payments to the appellee colleges after this litigation began. They announced their intention to make payment of accumulated grants only after the court below ruled the Maryland program was constitutional, and payment was not made until the court below and this Court denied injunctions pending appeal. Their actions reflect a greater degree of caution than *Lemon II* required. But, as was true in *Lemon II,* "this is not a case where it could be said that appellees acted in bad faith or that they relied on a plainly unlawful statute." 411 U.S. at 207.

CONCLUSION

For the several reasons stated above, appellants' constitutional claims are without merit. The judgment of the District Court should be affirmed and the appellants should be denied all relief.

Respectfully submitted,

PAUL R. CONNOLLY
CHARLES H. WILSON
1000 Hill Building
Washington, D.C. 20006
Attorneys for Appellees Loyola College and Mount Saint Mary's College

Of Counsel:

C. EDWARD JONES
1100 One Charles Center
Baltimore, Maryland 21201

JOHN C. EVELIUS
1100 One Charles Center
Baltimore, Maryland 21201

WILLIAMS, CONNOLLY & CALIFANO
1000 Hill Building
Washington, D.C. 20006

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-730

JOHN C. ROEMER, III, EDWARD E. DOERR,
KENNETH A. STEVENS, AND
CYNTHIA KOONCE MILLER,

Appellants,

v.

BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND; MARVIN MANDEL, GOVERNOR; LOUIS L. GOLDSTEIN, COMPTROLLER; JOHN A. LUETKEMEYER, TREASURER; COLLEGE OF NOTRE DAME; MOUNT SAINT MARY'S COLLEGE; SAINT JOSEPH COLLEGE; AND THE ASSOCIATED PROFESSORS OF LOYOLA COLLEGE OF THE CITY OF BALTIMORE, INC.,

Appellees.

ON APPEAL FROM A UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

BRIEF OF STATE APPELLEES

FRANCIS B. BURCH,
Attorney General of Maryland,
HENRY R. LORD,
Deputy Attorney General,
GEORGE A. NILSON,
Assistant Attorney General,
Chief, Legislation and Litigation,
One South Calvert Building,
Baltimore, Maryland 21202,
For State Appellees.

The Daily Record Co., Baltimore, Md. 21202

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Appellees.

ON APPEAL FROM A UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

BRIEF OF STATE APPELLEES

OPINION BELOW

The majority and dissenting opinions and the findings of fact of the three-judge District Court for the District of Maryland are reported at *Roemer v. Board of Public Works*, 387 F. Supp. 1282 (D. Md. 1974) and were

printed in the Appendix to the Jurisdictional Statement at pages A-1-A-51.[1]

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment, United States Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . ."

Fourteenth Amendment, United States Constitution:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTE INVOLVED

The Maryland statute at issue here (Article 77A, §§ 65-69 of the Maryland Code) provides for a program of public aid to private colleges and universities in the State. The statute, as originally enacted in 1971, is printed at pages 12-15 of the Joint Appendix. The statute, as later amended and as it existed at the time of the decision below (the Maryland Act), is printed at pages A-52-A-56 of the Jurisdictional Statement.

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[1] Citation of abbreviations in this Brief refer to the following: "J.S." — Jurisdictional Statement; "J. App." — Joint Appendix; "Tr." — Trial transcript; "DX" — Defendant's Exhibit; "R." — Record.

QUESTIONS PRESENTED

1. Whether Maryland's program of general purpose aid grants to institutions of higher learning has the primary effect of advancing religion where less than one-fifth of the presently eligible colleges are demonstrably church-related but not pervasively sectarian?

2. Whether the Maryland college aid program necessarily fosters excessive government entanglement with religion simply because several church-related colleges are eligible and the aid is not restricted to one-time construction grants or to grants for similarly specific "inanimate" purposes?

3. Even if Maryland's college aid program should be found unconstitutional as heretofore applied to one or more of the appellee institutions, would such a holding justify striking down the statute and the entire program in the face of a clear severability clause?

4. If Maryland's college aid program is found constitutionally wanting, would this Court be justified in requiring the appellee institutions to refund monies paid to and received by them in good faith after the lower court's holding that the program was constitutional and after appellants' requests for injunctions had been denied?

STATEMENT OF THE CASE

A. *Proceedings Below.*

In 1972 the appellants, four Maryland taxpayers, instituted suit claiming that Maryland's program of aid to higher education violated the Establishment Clause of the First Amendment to the United States Constitution, as applied to the states through the Due Process

Clause of the Fourteenth Amendment (J. App. 6). Maryland's Board of Public Works, the three officials comprising the Board, and five out of eighteen colleges receiving State aid were named as defendants.[2]

The complaint alleged that a pervasive religious influence permeated the entire educational program of each of the defendant colleges and that all were "sectarian educational institutions" (J. App. 7-8). Alleging that the statute authorizing the aid program was unconstitutional on it face and as applied because such sectarian institutions were permitted to receive public funds, the complaint prayed that further administration of the aid program be enjoined and that the defendant colleges be required to refund grant monies theretofore paid to them.

A three-judge District Court was convened pursuant to 28 U.S.C. §§2281, 2284. Following the disposition of pre-trial motions (n. 2, *supra*) and extensive discovery conducted by the plaintiffs, trial commenced in May of 1973. Following the completion of that trial some four weeks later, and after considering nearly 2,000 pages of transcribed testimony, several hundred documents introduced into evidence and the extensive proposed findings of fact and legal memoranda submitted by the parties, the three-judge court heard oral argument and, on October 16, 1974, held that Maryland's aid program was constitutional (J.S., p. A-1). The court held that Maryland's program did not have the primary effect of

[2] Two organizations were included among the original plaintiffs, but their claims were dismissed for lack of standing. *American Civil Liberties Union v. Board of Public Works,* 357 F. Supp. 877 (D. Md. 1972). At the same time the plaintiffs' Free Exercise claim was dismissed for failure to state a claim. One of the original defendant colleges, Western Maryland College, is no longer party to these proceedings. See p. 9 n. 7, *infra*.

aiding religion and did not involve the State in excessive entanglement with religious institutions. The request for a refund of prior awards was denied. A dissenting opinion was filed by Circuit Judge Bryan (J.S., p. A-26). Separate findings of fact were entered by the court (J.S., p. A-35).

After the entry of judgment, appellants sought to enjoin any payments to the appellee colleges pending review of the lower court's decision by this Court. Both the District Court and this Court denied their requests for injunctive relief in November of 1974.

B. *Maryland's Aid Program.*

The initial statutory enactment providing for State aid to private higher education was passed by Maryland's General Assembly during its 1971 session and signed into law as Chapter 626 of the Laws of 1971 at a time when this Court had yet to directly address the First Amendment implications of public aid to church-related institutions of higher learning. Maryland did not have then, and does not have today, any general program of aid to private schools at the primary or secondary level. The 1971 statute provided for a program of non-categorical grants to private colleges and universities in Maryland to help ease the growing financial problems shared by those schools with private institutions of higher learning throughout the country. In 1972, at its first legislative session following this Court's decision in *Tilton v. Richardson,* 403 U.S. 672 (1971), the General Assembly passed a bill (introduced before the commencement of the proceedings below) amending the original statute so as to explicitly prohibit eligible institutions from using any of the public funds for "sectarian purposes". Md. Code, Art. 77A, §68A (Ch. 534 of the Laws of 1972). At the same

time, § 68 of Art. 77A was amended so as to direct (rather than merely authorize, as had previously been the case) the Board of Public Works and the Maryland Council for Higher Education (the Council) to "adopt criteria and procedures, not inconsistent with this subtitle, for the implementation and administration of the aid program . . ." By the 1972 amendments, the scope of those procedures was enlarged so as to specifically provide for the submission of reports or data "concerning the utilization of . . . [State] monies" by the eligible institutions.

While the aid program is jointly administered by the Board of Public Works and the Council, the principal administrative responsibility rests with the Council[3] which, as the lower court found, "has considerable expertise as to the character and programs of the State's institutions of higher education derived from its other responsibilities" (J.S., p. A-17). The Council was created by legislation enacted prior to the inception of the Maryland aid program and was charged with the responsibility for the overall coordination of higher education in Maryland to assure an adequate allocation of educational resources. Md. Code, Art. 77A, §§ 28-32. In fulfilling that overall responsibility, the Council has collected extensive information about private colleges and universities in Maryland and has studied and reported on programs and practices of those institutions entirely independently of its administrative authority and responsibilities under the challenged aid program (J.S., pp. A-8, A-17).

In administering the Maryland Act, the Council essentially engages in a three-level screening of

[3] The Council was not charged with any statutory responsibility for administering the aid program until the passage of the 1972 amendments (J. App. 14; Tr. 1499).

institutions seeking State Funds. The first level of inquiry involves consideration of whether an institution meets the statutory eligibility requirements, producing the elimination of any institution awarding exclusively theological or seminarian degrees.[4] The lower court noted that "[t]here has been no serious suggestion that institutions found eligible violate the [eligibility] standard[s] or that this determination entangles the Council in religion" and that several institutions have been disqualified from the aid program in this manner (J.S., p. A-47). The Council also seeks to determine at this stage whether the educational program of any institution seeking aid is principally religious in nature, and several colleges have been excluded from the aid program on the basis of such determinations (Tr. 1578-80; 1588-90).

The second level of screening occurs once an institution is found to be eligible under the program and a computation of its aid entitlement has been made pursuant to the statutorily prescribed formula.[5] At that point the president of the institution is required to certify under oath prior to receipt of any State funds

[4] In order to qualify for aid, the Maryland Act specifically requires that a college or university must (1) be non-profit and accredited by the Maryland State Department of Education; (2) have been in existence prior to July 1, 1970; (3) maintain one or more earned degree programs culminating in associate of arts or bacculaureate degrees; and (4) not award only seminarian or theological degrees. Md. Code, Art. 77A, § 66.

[5] The original statute provided for set annual grants of $500.00 for each bachelor's degree and $200.00 for each associate of arts degree awarded by eligible colleges (J. App. 13). The formula was modified in 1973 to allow for additional awards based on graduate level degrees (J.S., p. A-56). The current formula, as amended in 1974, bases the awards on the number of full-time equivalent students rather than on degrees awarded, Art. 77A, § 67 (J.S., pp. A-53-A-54).

that those funds will not be expended for sectarian purposes in violation of Section 68A (J.S., p. A-48).[6] Upon receipt of the required certification, the formula-determined funds are disbursed for utilization by the college or university.

Pursuant to the mandate of Art. 77A, § 68, each institution receiving aid is required to submit a report to the Council in the following year, detailing the purpose or purposes for which the State funds were expended. That report must be accompanied by a certificate under oath from the institution's president that the funds in question were not used for sectarian purposes. These verified "utilization of funds reports" submitted by the institutions are the primary vehicle by which the Council assures compliance with the statutory prohibition of § 68A against sectarian usage of State funds at this third and final level of the process (Tr. 1515-17). If an initial utilization of funds report lacks sufficient detail for an evaluation of whether the funds were spent only for lawful purposes, then the Council may seek, and has in the past sought, additional information (Tr. 1611-16, 1617-22). The Council also may request a State audit of the grant funds, if necessary, although the lower court found that "[t]he usage verification and the normal annual accounting which each college conducts" would make such an audit generally unnecessary (J.S., p. A-48). Even where such State audits might be necessary, the lower court found them to be "quick

[6] § 435 of Art. 27 of the Maryland Annotated Code defines the offense of perjury as including, *inter alia*, "an oath or affirmation, if made willfully and falsely in any of the following cases . . .: . . . in all affidavits required by law to be taken; . . . all affidavits required to be made to reports and returns made to . . . any officer of the government . . . ."

and non-judgmental" and capable of being accomplished in one day or less (J.S., p. A-48).

C. *Actual Experience under the Aid Program with Respect to Church-Related Institutions.*

As of the trial and decision below, there had been no actual experience in administering the present aid program (including the statutory prohibition against the use of funds for sectarian purposes) vis-a-vis church-related colleges and universities. In November of 1971, seventeen institutions were awarded approximately $1,700,000.00 for degrees conferred during the 1970-71 academic year (J.S., p. A-37). Of that amount, only $429,500.00 was awarded to the four appellee institutions.[7] Those awards were paid pursuant to the original 1971 version of the Maryland Act, which lacked the statutory prohibition against sectarian usage of funds, and at a time when the certification, accounting and reporting procedures later adopted by the Council pursuant to the 1972 statutory amendments were not yet in effect (Tr. 1499-1506).[8]

Following the commencement of the proceedings below, the State of Maryland determined that it would be appropriate to withhold and place in escrow further

[7] An additional $90,500.00 was awarded to Western Maryland College, a party to the proceedings below (DX 15; Tr. 1546). After this Court noted probable jurisdiction, appellants moved to dismiss Western Maryland College as an appellee.

[8] Appellants do not here seek any refund of these first year monies. Their refund claim is limited to the later payments of graduate program awards and of the escrow awards disbursed after the lower court's decision (appellants' brief, pp. 75-80).

grant monies intended for the eligible church-related colleges involved in the litigation pending a decision in the case by the three-judge District Court (J.S., p. A-37 n. 2). Except for the graduate program awards paid to Western Maryland and Loyola Colleges after trial and the entry of the single district judge's proposed findings of fact (R. 1399-1402), no State funds were paid to any church-related college or university until after the three-judge District Court had upheld the aid program and the appellants' applications for injunctive relief pending appeal had been denied.

Thus, the record below with respect to actual usage of first year funds and with respect to the manner in which Maryland officials have administered the program must be viewed in light of the fact that no public monies had ever been paid to church-related institutions of higher learning under the current version of Maryland's aid program.

D. *Nature of the Colleges Eligible for Aid.*

Less than one-third of the colleges and universities eligible to receive funds under the Maryland Act have ever been claimed by appellants to be church-related. Of the five institutions originally named in this case, one has since ceased operation altogether (Saint Joseph College) and a second (Western Maryland College) is no longer a party. It is thus fair to say that only three institutions of higher learning are now claimed by the appellants to be church-related. This is less than one-fifth of the total number of eligible institutions. There is no claim that the Maryland aid program is unconstitutional as applied to the numerous other colleges and universities which have continued to receive State assistance under the Maryland Act.

E. *Nature of the Appellee Colleges.*

After an extensive factual inquiry into the operation and nature of the appellee institutions,[9] the lower court found that none were prevasively sectarian but that all were church-related and conformed closely to the colleges approved in *Tilton v. Richardson,* 403 U.S. 672 (1971) (J.S., pp. A-3, 4, 10, 11). These Maryland colleges were contrasted with the more strongly sectarian South Carolina college receiving aid under the state statute upheld in *Hunt v. McNair,* 413 U.S. 734 (1973).

The appellee institutions have described in their respective briefs here in some detail the nature and extent of the particular evidence below which supports the generalized findings of the lower court as to each college. While no useful purpose would be served by duplicating those detailed analyses here, it is appropriate to summarize the various factual findings of the three-judge District Court with respect to the nature of Maryland's church-related colleges:

1. The colleges are not "so permeated by religion that the secular side cannot be separated from the sectarian" (J.S., p. A-38).

2. Religion "does not slant the conduct of classes" at these colleges (J.S., p. A-38).

3. ". . . [T]here is no actual college policy encouraging prayer in class. It is treated as a facet of the instructor's academic freedom". The evidence does not

[9] In addition to the several hundred documents introduced into evidence at the trial, testimony was given by the presidents and staff and faculty members of each college, one expert witness on the teaching of religion at the college level and the staff member of the Council with primary responsibility for administering the aid program.

establish that "beginning a class with prayer in any way diminishes the atmosphere of intellectual freedom which marks these colleges . . . ." (J.S., p. A-34). The record contains "clear and convincing evidence that courses at each [of these colleges] . . . are taught 'according to the academic requirements intrinsic to the subject matter of the individual teacher's concept of professional standards'. *Tilton v. Richardson, supra,* 403 U.S. 681" (J.S., p. A-40).

4. The record does not reveal any significant faculty hiring bias based on religious considerations and the evidence indicates that the faculty members of each college are "professionals who value academic freedom and see no place for religious bias in liberal arts education . . . ." (J.S., p. A-41).

5. Religious indoctrination is not "a substantial purpose or activity" at any of the colleges and all of them are "characterized by an atmosphere of academic freedom rather than religious indoctrination" (quoting from *Tilton v. Richardson, supra*) (J.S., p. A-43).

6. While all of the institutions encourage spiritual interest to a degree, none of them "go beyond providing the opportunities and occasions for religious experience" (J.S., p. A-45).

The one particular respect in which the lower court was unable to find a clear absence of sectarianism was the manner in which theology and religion courses were taught and studied in these colleges. While specifically avoiding a finding that these courses were taught in a sectarian manner or other than as intellectual disciplines, the lower court applied a special burden of proof in this area and held that the *evidence was not sufficiently clear and compelling* to support a finding that the courses were taught as academic disciplines

(J.S., pp. A-13, 43, 46, 50). Finding the conduct of these courses readily separable from the remainder of the general college programs, the lower court held that the "sectarian purpose" prohibition of Art. 77A, § 68A should properly be applied by the State so as to prevent public monies from supporting the teaching of these particular courses (J.S., p. A-50).

SUMMARY OF ARGUMENT

The Establishment Clause Test

In order to evaluate claims that various statutes and governmental aid programs violate the Establishment Clause of the First Amendment to the United States Constitution, this Court has evolved a three-part "test" to be applied:

1. The statute or program must have a secular legislative purpose;

2. It must have a primary effect that neither advances nor inhibits religion; and

3. It must avoid excessive government entanglement with religion.

No claim is presented here under the Free Exercise Clause of the First Amendment and the appellants concede, as they must, that Maryland's aid program has a legitimate secular legislative purpose. Accordingly, this case focuses on the application of the primary effect restriction and the requirement that the State avoid any excessively entangling relationship with religion.

Application of these two tests, more appropriately described as frameworks for analysis of competing constitutional strictures, requires at the outset a realization that neither test imposes absolute requirements and that both present questions of degree not

susceptible of finite resolution. It is well established that the primary effect test does not bar any program which aids in some manner a religiously affiliated institution and that the excessive entanglement test does not prohibit all contacts and all relationships between the state and religious institutions.

Primary Effect

In order to demonstrate that the Maryland program of aid to higher education has a primary religious effect, it must be established that public monies either:

1. Are paid over to "an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in a religious mission"; or

2. Fund a "specifically religious activity in an otherwise secular setting". *Hunt v. McNair,* 413 U.S. 734, 743 (1973).

While appellants continue to urge, at least in passing, that the appellee institutions are permeated by religion, the thrust of their primary effect argument is that the Maryland aid program violates the second part of the test by funding specifically religious activities or by failing to provide adequate assurances that the funding of such activities will not occur. The pivotal focus in applying the primary effect test must be on the nature of the institution or institutions receiving public funds. The fact that the recipients of aid under the Maryland program are colleges rather than primary or secondary schools is critical both because of the age and nature of the student body and because of the manner in which these college level educational programs are conducted. If, as is the case here, the educational programs offered by the several church-related colleges receiving aid in

Maryland are characterized by a pervasive atmosphere of academic freedom and non-sectarianism, then the fact that they happen to be church-affiliated should not be held to place them in the same category as parochial primary or secondary schools. *Tilton v. Richardson,* 403 U.S. 672 (1971); *Hunt v. McNair,* 413 U.S. 734 (1973) Since their setting is "otherwise secular", it is necessary in order to defend the aid program only to show that it has not in fact aided any specifically religious activity and provides for sufficient safeguards to protect against the possible use of public funds for such a purpose.

The evidence below fails altogether to support any finding that specifically religious activities have been aided under the present Maryland program. Similarly, the combination of Maryland's explicit statutory prohibition against the use of any public funds for sectarian purposes and the procedures which have been established by the administering agencies charged with enforcing that prohibition represent adequate assurances that the possibility of such prohibited support occurring in the future is at most speculative. Such speculation cannot properly serve as the basis for any holding that the Establishment Clause is violated.

Excessive Entanglement

This Court has developed three factors which must be considered in determining whether the admittedly imprecise line between permissible involvement of the State in the affairs of a religious institution and impermissible excessive entanglement has been crossed:

1. The overall character and purposes of the institutions aided;

2. The nature of the aid provided; and

3. The resulting relationship between the government and the religious institution. *Lemon v. Kurtzman,* 403 U.S. 602, 615 (1971).

While no one of these factors can be considered in isolation from the others, the contrasting decisions of this Court with respect to aid to higher education and aid to parochial primary and secondary schools make it clear that the character of the institutions receiving aid is the controlling element of the equation. *Lemon v. Kurtzman, supra; Tilton v. Richardson, supra; Hunt v. McNair, supra.*

While the "nature of the aid" may assume a greater importance at primary or secondary schools with a dominant religious mission, the "ideological neutrality" of the type of aid is only of secondary importance in the context of a college environment characterized by an overall atmosphere of academic freedom. A classroom building, for example, is only as ideologically neutral as what goes on inside it. If the entanglement risks were minimal in periodically inspecting the uses to which the buildings in *Tilton* were put, then the risks must be equally minimal in inspecting the manner in which teachers use those some buildings in that same academic environment.

Similarly, the nature of the resulting relationship which emerges between the state and the private colleges receiving aid is largely determined by the fundamental character of those colleges. The mere fact that public monies may be paid in the form of annual operating expense grants rather than one-time construction grants does not necessarily increase the degree of entanglement. Indeed, a one-time construction grant program contains the seeds for even greater

entanglement since every dollar paid requires long-term scrutiny of the use to which the building is put. Annual operating expense grants, on the other hand, do not require any such long-term scrutiny.

Facial Validity of the Maryland Act

Should this court find any constitutional defect in the Maryland aid program as applied to one or more church-related colleges, then the unequivocal severability clause of the Maryland Act must be honored. *Tilton v. Richardson, supra; Sloan v. Lemon,* 413 U.S. 825 (1973). The severability clause here applies to the possible invalidation of payments as well as portions of the statute. Invalidating the Act as applied to one or more colleges should not jeopardize the right of the vast majority to continue to receive payments under the program.

Refund of Prior Grants

The appellants' request that the appellee colleges be required to refund grant payments made since the trial below is governed by the equitable principles enunciated in *Lemon v. Kurtzman,* 411 U.S. 192 (1973). Application of those principles requires a denial of any refund relief.

ARGUMENT

I.

INTRODUCTION: THE UNDERLYING ESTABLISHMENT CLAUSE TEST.

Over the years this Court has articulated a three-part test to be applied in resolving the constitutional issues involved in Establishment Clause cases. That "clearly

stated, if not easily applied" test requires Maryland's college aid program to satisfy three conditions:

> ". . . First, the statute must have a secular legislative purpose. E.g., *Epperson v. Arkansas*, 393 U.S. 97. Second, it must have a 'primary effect' that neither advances nor inhibits religion. E.g., *School District of Abington Township v. Schempp*, 374 U.S. 203. Third, the statute and its administration must avoid excessive government entanglement with religion. E.g., *Walz v. Tax Comm'n*, 397 U.S. 664." *Meek v. Pittenger*, ___ U.S. ___, 43 U.S.L.W. 4596, 4598 (May 19, 1975).

While the basic elements of this three-part test have their origins in earlier decisions of this Court, the test's application to programs of aid to higher education is of recent vintage. Despite the fact that this Court has consistently invalidated programs of aid to primary and secondary education since 1971,[10] during that same period it has sustained the only two programs of aid to colleges and universities that have been before it for review. *Hunt v. McNair*, 413 U.S. 734 (1973) and *Tilton v. Richardson*, 403 U.S. 672 (1971).[11]

While application of the three-part test may often be difficult, the test itself is a carefully articulated

[10] E.g., *Meek v. Pittenger, supra* (textbook loan program upheld; other aid programs invalidated); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973); and *Lemon v. Kurtzman*, 403 U.S. 602 (1971),

[11] In addition, on the same day that the tuition grant program for primary and elementary school students was invalidated in *Committee for Public Education v. Nyquist, supra*, this Court declined to review a decision upholding a program of loans to college students. *Durham v. McLeod*, 259 S.C. 409, 192 S.E.2d 202 (1972), *appeal dism'd for want of a substantial federal question*, 413 U.S. 902 (1973).

embodiment of the fundamental proposition that the First Amendment does not command the erection of an absolute "wall of separation" between church and state (as was once thought), but rather requires the state to follow a neutral course of action in matters touching upon religious affairs. In more recently rejecting any rigid application of the metaphysical "wall" standard, the Court has stated that the principle of neutrality requires a "line of separation [which], far from being a 'wall', is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship". *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). "The problem, like many problems in constitutional law, is one of degree." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

Under the primary effect prong of the Establishment Clause's neutrality doctrine, it is well established that a government aid program may constitutionally have certain incidental or secondary beneficial effects on church affiliated institutions.[12] Were this not the case, then neither church-related educational institutions nor their students could ever participate in or benefit from any public aid program. As was pointedly observed by this Court in *Hunt v. McNair*, 413 U.S. 734, 742-3 (1973):

> ". . . Whatever may be its initial appeal, the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected . . . Stated another way, the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an

[12] In *Meek v. Pittenger*, ___ U.S. ___, 43 U.S.L.W. 4596, 4602 (May 19, 1975) the primary effect test was described as requiring a determination of whether an aid program "necessary results in the *direct* and *substantial* advancement of religious activity." (Emphasis supplied).

institution frees it to spend its other resources on religious ends."

The argument that every form of financial aid to church-sponsored activity violates the Establishment Clause was characterized in *Tilton v. Richardson*, 403 U.S. 672, 679 (1971) as being "simplistic" and having been "rejected long ago."

Just as the word "primary" cannot be read out of the primary effect test, so too must the word "excessive" be given its proper emphasis in any excessive entanglement analysis. "Some relationship between government and religious organizations is inevitable". *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). "The complexities of modern life inevitably produce some contact" between church and state. *Walz v. Tax Commission*, 397 U.S. 664, 676 (1970). As in the case of the *primary* effect test, determination of whether the relationship is *excessively* entangling is a question of degree and not of absolutes. The very words themselves ("primary" and "excessive") are clearly words of degree which neither contemplate nor permit a rigid or doctrinaire approach to the problem, and the tests of which they are a part must be viewed as constituting the appropriate framework of analysis for the issues rather than criteria to be applied in an unyielding or automatic fashion. The Court has repeatedly recognized this in its recent decisions in this area.

Indeed, both the very nature of the interplay between the Free Exercise and Establishment clauses of the First Amendment, and the relationship within the Establishment Clause issue of the primary effect and excessive entanglement tests themselves, require the disavowal of an absolutist approach, If the primary effect test, for example, were to require the absence of

any secondary or indirect effect beneficial to religious institutions, then as a practical matter governmental aid programs would either *necessarily* require an excessively entangling degree of governmental oversight (to assure the absence of such an effect) or would have to exclude altogether any program with church ties or sponsorship. Such a result would be clearly inconsistent with the underlying principle of governmental neutrality and would lead inevitably to an anti-religion result not contemplated by the framers or by this Court's decisions under the First Amendment.[13]

The brief filed on behalf of Loyola and Mount Saint Mary's Colleges contains a thorough analysis of the evolution of the primary effect and excessive entanglement tests as applied in Establishment Clause decisions of this Court over the years. While it is neither appropriate nor necessary to repeat that analysis at length in this brief, it is not possible to avoid some repetition if the arguments advanced by the State are to be presented in their proper context. We trust that where such duplication occurs it will be recognized as unavoidable, and that where an argument made in the brief of these colleges is not repeated here, the Court will recognize that fact as an effort to avoid duplication

[13] Undeniably, pervasively sectarian schools and other pervasively sectarian church-operated programs may not be the recipients of a broad range of government aid as a consequence of the interplay or tension between the primary effect and excessive entanglement tests. This is so because it is impossible to separate the secular from the sectarian elements of these programs and that to even attempt to do so would necessarily involve excessive entanglement. To say that this same result should follow in a program which is religiously sponsored or affiliated but is not pervasively sectarian would make a mockery of the often stated proposition that the state and federal governments are barred by the First Amendment from inhibiting religion just as they are barred from advancing it.

and not as an indication that the State does not subscribe to or recognize the importance of the argument.

II.

THE MARYLAND ACT DOES NOT HAVE THE PRIMARY EFFECT OF ADVANCING RELIGION.

A. *The General Principles*

In order to demonstrate that Maryland's aid program has the primary religious effect prohibited by the First Amendment to the United States Constitution, appellants must establish that State aid "flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or . . . [that] it funds a specifically religious activity in an otherwise secular setting." *Hunt v. McNair,* 413 U.S. 734, 743 (1973).[14] In essence, for purposes of the two-part primary effect test, the nature of the institution and its educational program is thus the critical element in the equation. If religion pervades a school or college to the extent that a substantial portion of its educational functions are subsumed in a dominant religious mission, then governmental funds may not be paid to that institution for any purpose whatsoever. If, on the other hand, the school or college either has no church ties at all or fits the characterization of the colleges discussed in *Tilton v. Richardson,* 403 U.S. 672 (1971), and *Hunt v. NcNair, supra,* then public funds may be paid so long as they do not fund any specific religious activity.

[14] Appellants concede that the Maryland Act has a legitimate secular legislative purpose, thus eliminating the need for any discussion here of the first element of the three part test.

Notwithstanding the appellants' effort to argue that the appellee colleges here are permeated by an excessive religious influence, it is clear under any reasonable view of the extensive evidence and the decision of the lower court that the resolution of the primary effect issue in this case turns on a determination as to whether State monies are funding "specifically religious activity" at Maryland's church-related private institutions of higher learning.

B. *Importance of the Setting: The Nature of the Appellee Colleges*

As noted earlier, this Court has only considered two previous cases involving government aid programs directed at colleges and universities. The principle was first articulated in Chief Justice Burger's plurality opinion in *Tilton v. Richardson,* 403 U.S. at 685, that

> ". . . there are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools"

and that these differences must be given prominent consideration in determining the constitutionality of any program of aid to higher education. This basic proposition was later reaffirmed in *Hunt v. McNair,* 413 U.S. 734, 746 (1973) (which also involved an aid to higher education program) and *Committee for Public Education and Religious Liberty v. Nyquist,* 413 U.S. 756, 777 n. 32 (1973) (which did not).

The difference between church-related colleges and pre-college church schools is not an absolute or categorical difference which necessarily requires *all* colleges to be treated differently from *all* primary and

secondary schools. Rather, the distinction is one based upon the greater degree of maturity of the average college student and upon the fact that church-related colleges, both in recognition of the maturity of their student bodies as well as for other reasons, ordinarily serve an entirely different function from the point of view of the churches with which they are affiliated. In essence, most churches which have become involved in the business of education consider any effort at religious indoctrination in an educational setting to be appropriate, if at all, only at the lower age levels. Conversely, most church-related colleges and universities consider their basic function to be educational or academic rather than religious. The reasons for this substantial and critical difference in approach were identified in Chief Justice Burger's plurality opinion in *Tilton v. Richardson, supra,* as follows:

> "The 'affirmative if not dominant policy' of the instruction in pre-college church schools is 'to assure future adherents to a particular faith by having control of their total education at an early age.' . . . There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination . . . The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the congressional objectives and limitations. Furthermore, by their very nature, college and post-graduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines. Finally, many church-related colleges and universities seek to evoke free and critical responses from their students and are characterized by a high degree of academic freedom." 403 U.S. at 685-86.

Having found the four Catholic colleges involved in the *Tilton* case to be "institutions with admittedly religious

functions but whose predominant higher education mission is to provide their students with a secular education" (403 U.S. at 686-87), the Court concluded that:

> "Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education. This reduces the risk that government aid will in fact serve to support religious activities." 403 U.S. at 687.

We do not mean to suggest that all church-run or church-related colleges correspond to those considered by the court in *Tilton*. Some may indeed be as pervasively sectarian as any church-run primary or secondary school. But the fact remains that most are not, and that the church-related colleges receiving money under the Maryland aid program are not. The appellants bore the burden of demonstrating the contrary and failed to so.[15]

In considering the correctness of the lower court's holding that the appellee colleges conform closely to the colleges discussed by this Court in *Tilton v. Richardson,* it must be emphasized that various religious indicia found in an educational setting are properly of substantially less concern at the college level than would be the case in a primary or secondary school. It is implicit in Chief Justice Burger's observations in *Tilton v. Richardson* that a teacher in religious garb, for example, will have a substantially different impact on a classroom of first graders than on a classroom of

[15] The "burden rests on appellant [plaintiff] to show the extent to which the College is church-related, cf. *Board of Education v. Allen,* 392 U.S. at 248, 20 L. Ed. 2d 1060 . . . ." *Hunt v. McNair,* 413 U.S. 734, 746 n. 8 (1973).

college sophomores. Religious symbols which may have a significant effect on young children cannot possibly have the same influence on the college student. The "less impressionable" nature and heightened "skepticism" of the college students themselves, as well as the internal discipline and encouragement of critical responses inherent in courses taught at the college and post-graduate levels in an atmosphere of general academic freedom, significantly alter the impact and importance of such isolated religious trappings. Indicia of the church's "presence" in an institution cannot be examined out of the context of the nature and overall character of the institution itself. The evidence is overwhelming in this case that Maryland's church-related colleges are characterized by an atmosphere of academic freedom and are not pervasively sectarian.

C. *Application of the Primary Effect Test*

Since no church-related college receiving money under Maryland's aid program is demonstrably so pervasively sectarian that a substantial portion of its educational function is subsumed in any religious mission, it becomes necessary to focus on the second part of the test identified in *Hunt v. McNair, supra* — whether the aid program "funds a specifically religious activity in an otherwise secular setting." There are essentially two ways in which the burden of proving such a primary effect can be met. The first of these ways —`showing that State funds in fact have been used to directly support specifically religious activity — is simply not available to appellants here. The only State funds ever disbursed to and used by any of the appellee institutions at the time of the trial below were the initial 1971 awards payable under the original version of the Maryland Act. These payments were made prior to the adoption of the explicit statutory

prohibition against the use of funds for sectarian purposes and prior to the development of the present administrative machinery for enforcing that prohibition. Thus, even if the record here contained clear evidence of a use of *those* funds for a specifically religious activity (which it does not), that would have no bearing on the constitutionality of the *present* aid program.

The finding of the lower court that three institutions commingled their first year grants with general college operating funds (J.S., p. A-50) can hardly be used to strike down the present statute, especially in light of the fact that one of those colleges has since ceased operating, the other is no longer a party, and the overall educational program of all three is no less characterized by an atmosphere of academic freedom than that of the others. Even if expeditures of first year grants were relevant, a commingling of those monies shows nothing more than that it is possible that they were used to fund some specifically religious activity. Such a mere possibility with respect to funds dispensed under a previous version of the Maryland Act would be a slender reed upon which to now invalidate the entire program in its present form.

The second way in which funding of specifically religious activity can be shown is to demonstrate the absence of safeguards against such a result. This requires far more than the kind of speculation engaged in by appellants. The lower court here, in properly declining to engage in this kind of speculation, referred to this Court's observation in *Tilton v. Richardson,* 403 U.S. 672, 679 (1971) that:

> "A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement . . . But judicial concern about

these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional."

This judicial admonition against such speculation is, of course, entirely consistent with the holding in the *Tilton* case that the possibility of religious use of a governmentally financed structure after the expiration of the 20 year prohibition against such use was constitutionally unacceptable. While the actual religious use of such a building was indeed only a possibility, *it was a certainty that the use restriction would cease* to exist altogether in 20 years. Thus, it was the *combination* of the possibility of religious use with the certainty of the ultimate absence of any prohibition which was fatal to the durational limitation.

The prohibition in the Maryland Act against sectarian use of funds is permanent and without limit. The lower court found that the administering body "clearly understands that sectarian use is forbidden, no matter when it occurs" (J.S., p. A-49). There is no substantive or constitutionally significant distinction between Maryland's statutory prohibition and the similar prohibitions involved in *Hunt v. McNair,* 413 U.S. 734 (1973) and *Tilton v. Richardson, supra* (absent the 20 year limitation which is not present in the Maryland Act), and no apparent reason why the one should be less effective than the others.[16]

[16] The statutory prohibition involved in *Tilton* (20 U.S.C. § 751(a)(2)) excluded from the wide variety of academic facilities otherwise eligible for construction grants or loans "any facility used or to be used for sectarian instruction or as a place for religious worship or . . . any facility which . . . is used or to be used primarily in connection with any part of the program of a school or a department of divinity . . . ." The statutory prohibition in *Hunt v. McNair* was virtually identical.

The holding below that there are sufficient safeguards in the Maryland aid program to insure that funds are not diverted to support religious activity was not grounded solely on the statutory prohibition. The lower court also pointed to the prohibition against support of seminarian or theological degree programs, to the two certifications under oath of non-sectarian usage required each year of the president of each institution receiving aid, and to existing accounting procedures and the authority of the State to perform a public audit in the unlikely event that one should be necessary (J.S., p. A-12). The Court also cited in its findings of fact the general knowledge of the programs and operation of all Maryland colleges and universities which the Maryland Council for Higher Education acquires independently as a result of its other duties, the Council's practice of requiring additional follow-up data, where necessary, in conjunction with the post-expenditure verification, and the ability of the Council to adopt other follow-up procedures pursuant to the basic statutory mandate in order to insure that no State funds are initially used for sectarian purposes or later converted to such sectarian usage.

In order to conclude that these safeguards are inadequate, this Court would have to begin by assuming that the presidents of the appellee colleges will either fail to comprehend what is encompassed within sectarian usage of funds or will periodically give false oaths. Both assumptions appear to be foreclosed by the explicit refusal of the Court in *Board of Education v. Allen,* 392 U.S. 236, 245 (1968), to "assume that school authorities . . . are unable to distinguish between secular and religious books or that they will not

honestly discharge their duties under the law."[17] There is no evidence in this case which suggests in any way that Maryland's colleges or college presidents are not able to make these kinds of distinctions or that they will not honestly discharge their duty to do so under the Maryland Act.

Moreover, and in recognition of the fact that it would be inappropriate to rely *solely* on the good faith of the aid recipients, the State has required, and will continue to require, additional follow-up data with respect to the actual usage of funds when such data is necessary. And the State possesses the authority to conduct what the lower court found to be a "quick and non-judgmental" post-audit analysis and accounting review under those limited circumstances where such review may be warranted. These steps are taken and these powers are available not because the State does or should assume that college presidents are either incompetent or dishonest, but because it bears the ultimate responsibil-

[17] It is hardly any more difficult for a college president to distinguish between secular and religious usage of educational grant funds generally than it is to distinguish between secular and religious books. The fact that Maryland's utilization of funds reports must be given under oath (or affirmation) places an even greater incentive on their fairly making such distinctions and "honestly discharg[ing] their duties." This essentially places the *initial* burden on the college itself to restrict its expenditure of State funds to clearly non-sectarian aspects of its program and to develop on its own initiative internal accounting procedures upon which the college president can comfortably rely when he files his post-expenditure certification. The placement of this initial burden on the colleges themselves is reflected in the requirement of the Council that each college adopt and maintain such internal accounting and administrative procedures as are necessary to insure that state monies are not used for sectarian purposes (Tr. 1509-1510).

ity of assuring compliance with both the statute and the First Amendment.[18]

In short, there is no basis in the record for finding that the responsible State agencies either have been, or will in the future be, lax in their enforcement of the sectarian usage prohibition, and the lower court quite properly declined to engage in speculation to the contrary.

D. *The Maryland Program Should Not Be Overturned on The Basis of Speculation*

Any effort by the appellants to establish the inadequacy of the State's enforcement mechanism must, of necessity, be grounded not only on an inherent distrust of both college and State officials, but on speculation and some remote possiblity as opposed to either fact or probability. This Court should not accept appellants' invitation to imagine that it is looking back over five or ten years of administration of a state aid program to church-related colleges when the fact of the matter is that it is being urged to overturn an aid program which, in its present form and insofar as the record below is concerned, has never provided a single dollar to any church-related college. While the State strongly urges that no unconstitutional expenditures have been shown (in the first or any other year of the program) and that the administrative mechanisms established in the course of processing payments to colleges totally

[18] The oversight role of the State simply reflects a recognition of the fact that while neither it nor the courts should assume that school officials will not honestly discharge their duties, the State should not rely *entirely* on the good faith of others. *Meek v. Pittenger*, ___ U.S. ___, 43 U.S.L.W. 4596, 4602 (May 19, 1975); *Lemon v. Kurtzman*, 403 U.S. 602, 618-619 (1971).

lacking any church affiliation are constitutionally sufficient to protect against possible improper use of funds by any college, to hold that the primary effect test has not been satisfied here would be to answer a hypothetical question on the basis of assumptions and possibilities rather than on the basis of any facts supported by the record below.[19]

In *Wheeler v. Barrera,* 417 U.S. 402 (1974) this Court was asked to consider the question of whether the Establishment Clause prohibits a state from sending public school teachers into parochial schools to teach remedial courses in order to provide comparable educational services pursuant to Title I of the Elementary and Secondary Education Act of 1965. Just as the Court of Appeals had done below, this Court declined to pass on the question on the grounds that

> ". . . it is possible for the petitioners to comply with Title I without utilizing on-the-premises parochial school instruction. Moreover, even if, on remand, the state and local agencies do exercise their discretion in favor of such instruction, the range of possibilities is a broad one and the First Amendment implications may vary according to the precise contours of the plan that is formulated.
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> ". . . A federal court does not sit to render a decision on hypothetical facts, and the Court of Appeals was correct in so concluding." 417 U.S. at 426-27.[20]

[19] The procedures which have actually been developed thus far are, of course, not hypothetical. The appellants, in essence, ask this Court to overturn both the statute and the procedures as a matter of law on the grounds that they will necessarily prove inadequate over time and that the administrative machinery is not capable of responding to the requirements of the First Amendment.

To the extent that any finding that Maryland's existing administrative machinery is not adequate to insure compliance with the statutory prohibition is justified, this Court should decline to overturn the Maryland aid program and afford to State officials the opportunity to further develop any additional procedures thought necessary in the context of actually distributing public monies to church-related institutions.

A somewhat analogous approach was taken by the lower court here in the one area in which it was unable to conclude that the educational programs of the appellee institutions were characterized by the generally prevailing atmosphere of academic freedom. Based upon an apparent reversal of the customary burden of proof in Establishment Clause cases, the court said that it was "unable to characterize" the religion and theology courses taught at the appellee institutions and that there was no "clear indication" that these programs were taught as academic disciplines (J.S. p. A-13).[21] Eschewing any conclusion that these courses were *not* taught as academic disciplines, the Court

[20] Later, in *Meek v. Pittenger,* ___ U.S. ___, 43 U.S.L.W. 4596 (May 19, 1975), the Court confronted this precise issue on the basis of real and not hypothetical facts and held that the Pennsylvania auxiliary services program for primary and secondary schools violated the Establishment Clause.

[21] Ordinarily the burden of proving that a government aid program has not invalidated primary effect is placed squarely on those challenging it. *Hunt v. McNair,* 413 U.S. 734, 746 n. 8 (1973); *Board of Education v. Allen,* 392 U.S. 236, 248 (1968).

nonetheless found that "a possibility existed that these courses *could* be devoted to deepening of religious experiences in the particular faith rather than to teaching theology as an academic discipline" (J.S., p. A-13) (emphasis supplied). Because of this possibility, the Court ruled that

> "The Act must be administered so as to prevent any state funds from supporting the religious studies or theology programs at any institution. 'Sectarian purposes,' as that term is used in Art. 77A, § 68A, must be interpreted as encompassing the study of religion or theology." (J.S., p. A-50).

After noting that the Council had not thus far taken steps to administer the program in that fashion, the Court quite properly chose the option of directing the Council to do so rather than striking down the statute as unconstitutional, noting this Court's observation in *Tilton v. Richardson,* 403 U.S. 672, 679 (1971) that judicial concern about the possibility of the legitimate objectives of a law being subverted by lax enforcement would not, standing alone, justify striking down the law as unconstitutional.[22]

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[22] For apparently analogous reasons, the lower court observed elsewhere in its opinion that "[t]he procedural posture of this case has prevented the development of follow-up procedures to ensure that no state funds are converted to religious uses in later years" (J.S., p. A-18). Noting the absolute statutory prohibition against sectarian usage and the Council's demonstrated awareness of its responsibilities in the matter, the Court expressed itself as being "satisfied that adequate, non-entangling follow-up procedures will be developed" (J.S., pp. A-18, A-19).

III.

THE MARYLAND ACT DOES NOT FOSTER AN EXCESSIVE GOVERNMENT ENTANGLEMENT WITH RELIGION.

A. *The General Principles*

As this Court has previously noted, some relationship and contact between the government and religious organizations is inevitable. *Lemon v. Kurtzman,* 403 U.S. 602 (1971); *Walz v. Tax Commission,* 397 U.S. 664 (1970). The Constitution does not require the absence of all such relationships or contacts, but requires only that the government avoid *excessive* entanglement with religion. The test "is inescapably one of degree". *Walz v. Tax Commission, supra,* at 674.

The difficulty of determining whether a particular church-state relationship constitutes permissible involvement or excessive entanglement is compounded by the obvious tension which exists between the requirements of the primary effect test and the prohibition against excessive entanglement. On the one hand, an aid program must contain sufficient safeguards to assure that public monies awarded to a church-related college will not fund its religious activities. Requiring such safeguards necessarily demands a degree of governmental oversight with respect to the manner in which those funds are expended, thus inevitably creating some involvement of public officials in the affairs of the college receiving the funds. The thrust of the excessive entanglement prohibition is that such governmental oversight or administrative supervision must not be excessive or too deeply enmesh the government in the affairs of a church-related college.

Whether the line between permissible involvement and excessive entanglement has been crossed requires an analysis of three factors which this Court has previously identified: "the character and purposes of the institutions that are aided, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority". *Lemon v. Kurtzman,* 403 U.S. 602, 615 (1971).

B. *The Importance of the College Setting*

A careful analysis of the *Lemon* decision and others involving primary and secondary schools, as well as a consideration of this Court's decisions in the higher education cases *(Tilton v. Richardson,* 403 U.S. 672 (1971) and *Hunt v. McNair,* 413 U.S. 734 (1973)), makes it clear that the first of these factors — the character and purposes of the schools — is the decisive element in the entanglement analysis. As this Court observed in *Hunt v. McNair:*

> "The Court's opinion in *Lemon* and the plurality opinion in *Tilton* are grounded on the proposition that the degree of entanglement . . . varies in large measure with the extent to which religion permeates the institution." 413 U.S. at 746.

The Court's conclusion in *Hunt* that the South Carolina aid program did not engender excessive entanglement rested chiefly on its conclusion that "there is no evidence here to demonstrate that the college is any more an instrument of religious indoctrination than were the colleges and universities involved in *Tilton." Id.*

The plurality opinion in *Tilton v. Richardson,* 403 U.S. 672 (1971) had stressed the importance of the nature of the educational institution involved in applying both the primary effect and entanglement tests as follows:

> "Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education. This reduces the risk that government aid will in fact serve to support religious activities. Correspondingly, the necessity for intensive goverment surveillance is diminshed and the resulting entanglements between government and religion lessened." 403 U.S. at 687.

C. *The Nature of the Aid*

The lesson of *Tilton* and *Hunt* was not lost on the lower court here, which discussed the importance of the institutions' character and the relationship between that factor and the nature of the aid involved in the following terms:

> "What emerges from a consideration of these cases is the conviction that the ideological neutrality of a particular program of aid is dependent on the type of institution being benefited. The classroom buildings provided in *Tilton* and *Hunt* are no more neutral in the abstract than the classroom buildings which were maintained with public funds in *Nyquist.* The classes taught in the *Tilton* and *Hunt* classrooms are no more neutral than the classes taught by publicly subsidized teachers in *Lemon,* all other things being equal. Obviously, all other things are not equal. What would be impermissible in an institution staffed by members of a particular faith, administratively controlled by a religious body, and dedicated to the inculcation of a particular faith, may well be permissible in an autonomous institution staffed by faculty hired on the basis of academic merit, where academic freedom prevails, and where courses are taught in accordance with the requirements of an academic discipline. The Court could validly require that the state monitor the content of teaching at the

primary or secondary level to prevent even inadvertent lapses into religious indoctrination on the part of publicly subsidized teachers. Yet the Court could conclude that such monitoring would not be necessary at a college which maintained its academic freedom and integrity." (J.S., pp. A-15, A-16).

Plain logic supports the correctness of emphasizing the extent to which religious indoctrination or a religious mission is a part of the educational program of a church-related college. While not in the least suggesting that the nature or type of aid is constitutionally irrelevant, it must be readily apparent that both inanimate objects (such as textbooks and classroom buildings) as well as distinctly animate objects (such as teachers) cannot reasonably be assigned an ideological or non-ideological character without considering them in the context in which they function. Perhaps the best way to illustrate this is to consider the nature of the construction aid involved in *Tilton v. Richardson, supra.*

While it may be true that a building in and of itself is non-ideological in nature, it is apparent from the *Tilton* decision that what matters is the use to which the building is put. Were this not the case, the Court would not have stricken the twenty year limitation on the religious use prohibition contained in the *Tilton* statute. Quite clearly the Court not only permitted but required continuing inspection and surveillance of the uses to which the buildings were put. And the Court held that "[i]nspection as to use is a minimal contact." 403 U.S. at 688. If this is so, then it must be primarily because of the nature of the colleges at which the buildings were constructed. Obviously buildings are used by people. It is what people do in them that determines their use. The focus of our concern must be on the use which is made

of those buildings by teachers and others employed by the college to administer the educational program.

The particular buildings involved in *Tilton* included two libraries, a language laboratory, a science building, and a music, drama and arts building.[23] The discussion (in the primary effect portion of the opinion) of the use to which these buildings were put clearly indicates the critical importance of the character of the institution and the extent to which its teachers operate in an environment of academic freedom.

The only way to reconcile *Tilton v. Richardson* and *Lemon v. Kurtzman,* 403 U.S. 602 (1971), decided on the same day, is to conclude that whatever importance may be attached to the ideological or non-ideological character of the aid in a school with a primarily religious mission, the "nature" of the aid in the isolated sense of the term is of secondary importance in scrutinizing a program of aid to church-related colleges possessed of the characteristics present in *Tilton.* Can it be seriously contended that the result in *Tilton* would have changed if public funds had been allocated to pay the salaries of the chief librarians in the two libraries, the heads of the French and German Departments, the faculty members of the Chemistry and Physics Departments and the Music instructor and production manager of the Drama Department? In light of the fact that these very people would be the ones putting the buildings in question to their intended uses, it is difficult to perceive why scrutiny of the *use of the buildings* would be character-

[23] While none of these buildings were general classroom buildings, that fact cannot be accorded constitutional significance. The federal statute did not exclude classroom buildings from the category of eligible academic facilities. In *Hunt v. McNair,* state aid was extended to various buildings not identified in the court's opinion.

ized as an acceptable minimal contact and yet scrutiny of the *use to which the buildings were put by college personnel* would be considered unacceptable and excessive. Clearly the reason why both forms of aid are constitutionally acceptable turns on the nature of the institutions themselves and the fact that religious indoctrination was not one of their substantial purposes or activities.[24]

While it thus must be clear that government payments of salaries of faculty members staffing the *Tilton* buildings would be constitutionally acceptable, it is equally clear that state aid paying the salaries of those same types of school personnel working in the primary and elementary schools involved in *Lemon v. Kurtzman* would be constitutionally unacceptable. The reason for this was made clear in the Court's opinion in *Lemon v. Kurtzman:*

> The teacher is employed by a religious organization, subject to the direction and discipline of religious authorities, and works in a system dedicated to rearing children in a particular faith . . . . Inevitably some of the teacher's responsibilities hover on the border between secular and religious orientation . . . . [A] *dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenents, will inevitably experience great difficulty in remaining religiously neutral* . . . . With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine." 403 U.S. at 618-19. (Emphasis supplied).

[24] The Court's later opinion in *Committee for Public Education v. Nyquist,* 413 U.S. 756 (1973), further reinforces the view that the character of the school determines the ideological or non-ideological nature of the aid. In sharp contrast to the result reached as to the bricks and mortar aid in *Tilton,* the Court in *Nyquist* noted:

> "No attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, *nor do we think it possible within the context of these religion-oriented institutions* to impose such restrictions." 413 U.S. at 774. (Emphasis supplied).

Obviously the fact that the school personnel involved may be librarians, language or science teachers or instructors in the arts does not insulate them from the influence which affects teachers generally at a school operated to inculcate religious views. The acquisition of books can be religiously influenced; science teachers from Galileo to Scopes can attest to the tensions which may exist between religion and the sciences; music and drama are readily susceptible to a religious slant; and even the teaching of foreign languages can be subtly used as a tool to reinforce particular religious views, notwithstanding the suggestion to the contrary in the *Tilton* plurality opinion. While all of these possibilities exist at a pervasively sectarian school, particularly at the primary or secondary level, when these activities are undertaken at the college level and in an atmosphere where the basic tenents of academic freedom prevail, the possibility becomes so remote and speculative that the degree of "use inspection" required is minimal and constitutionally acceptable.

General-purpose grants have distinct advantages over special-purpose grants in terms of Maryland's overall educational policies and goals. A general-purpose grant affords the recipient considerable flexibility, permitting the college to use the grant funds where it finds the need most compelling, so long as the statutory and administrative restrictions are complied

with.[25] This flexibility is lacking when an aid program restricts the use of grant funds to specified purposes such as construction.[26] The general-purpose grant program challenged in this case aids the State in realizing its goal of preserving a viable system of private colleges and universities by permitting each college to meet its own particular needs or to develop its own special educational resources more effectively. A rigid, and we suggest, unjustified, adherence to the "nature of the aid" as a controlling factor in judging a college aid program would defeat this legitimate policy of individualized flexibility without furthering the basic purposes of the First Amendment. Conversely, if this Court should hold, as the appellants seem to urge, that *Tilton* represents the outer limits of permissible aid to higher education and that nothing other than one-time construction grants may be allowed (either generally or to church-related colleges), then the inevitable consequence will be either to encourage capital improvement programs (and expansion) where they may not be needed or to effectively eliminate or curtail the availability of aid in periods of declining enrollment. Such artificial distortions of the growth and operation of institutions of higher learning would be neither religiously neutral nor educationally sound.

D. *The Resulting Relationship*

The third and final element of the entanglement analysis suggested in *Lemon v. Kurtzman* focuses on

[25] It was noted at trial that "[s]ome of these institutions are in desperate need to have repairs on buildings and updating laboratories. Other institutions are in desperate need of monies for their scholarship programs." (Tr. 1583).

[26] See W. McGill, *Federal Aid to Higher Education: Some Problems*, 28 Record of N.Y.C.B.A. 819 (1971).

"the resulting relationship between the government and religious authority." In this regard, appellants urge that the Maryland *annual* grant programs should be sharply distinguished from the *one-time* construction grant involved in *Tilton v. Richardson*. But this ignores the fact that, despite the one-time nature of grants under the *Tilton* program, *continuing* governmental oversight of the use to which the completed facility is being put is required. It is difficult to perceive why continuing dollar oversight should necessarily be any more entangling than continuing use oversight.

Indeed, comparing the entanglement possibilities of annual grants covering operating expense items with a single large grant or series of grants funding a capital facility which will be in use for years to come, one can perceive advantages to the former from both a primary effect and an entanglement perspective. In the case of an annual operating expense item, the funds are put to immediate and final use. Funds spent on 1975 operating expenses do not require any re-examination of the nature of the institution and its various programs as operated in 1976, not to mention 20 or more years later. In *Tilton* facilities funding, every dollar spent carries with it a long-term sectarian use prohibition and the correlative long-term oversight relationship. When aid monies are spent on annual operating items, that same relationship *may* continue from year to year but the stakes are smaller since prior years' grants are no longer involved. In addition, if an institution's basic nature changes to pervasively sectarian, it can thereafter be excluded from the aid program without the State's having to worry about prior grants spent on permanent facilities. Obviously, in each type of program some kind of continuing awareness and relationship is necessary. But the mere fact that grants are

made on an annual basis hardly increases the entanglement problems.

E. *The Resulting Relationship in Maryland*

As noted earlier, effective administration of Maryland's aid program and enforcement of the statutory prohibition against sectarian usage involves a three-step process:

1. Determination of eligibility;

2. Requirement of pre-expenditure certification of non-sectarian usage; and

3. Post-expenditure confirmation of non-sectarian usage.

The Maryland Council for Higher Education, which has assumed the principal responsibility for administering the program, is aided in its functioning at all three stages by the broad general knowledge and expertise which it has acquired relative to higher education in Maryland as a result of its other duties. The fact that this information is obtained wholly apart from the administration of the aid program substantially reduces the extent to which the aid program itself might generate excessive entanglement by virtue of frequent State inquiry and information gathering.[27]

It is not seriously suggested either that any institutions found eligible for the program in fact violate the eligibility standards or that the Council's determination

[27] After describing the type of information collected by the Council in performing these other responsibilities, the appellants make the incredible statement that "such church-state contacts are entangling and proscribed." (appellants' brief, pp. 40-41). To suggest that the collection of such information outside the context of a specific aid program is itself proscribed by the First Amendment is absurd and without authority. Appellants have cited none.

of eligibility entangles it with religion (J.S., p. A-47). Similarly, the Council's requirement of a pre-expenditure verification or certification of non-sectarian usage from the presidents of the various colleges is hardly an element of entanglement. The only part of the administering process which appellants seriously urge raises entanglement problems is the post-expenditure verification and oversight procedure.

Clearly the submission by a college president of the verified utilization of funds report reflecting the purposes for which the funds were expended and containing his certification that they were not expended for sectarian purposes poses no entanglement risk. According to appellants, the danger or potential for excessive entanglement lies in the necessity of the Council's confirming or verifying the report filed by the institution.

Consideration of the extent and nature of the verification called for should not occur in a vacuum. This was properly recognized by the lower court, which prefaced its conclusion that Maryland's enforcement procedures were "effective and non-judgmental" by the following observation:

> "Because of the nature of the recipient schools, there is no necessity for state officials to investigate the conduct of particular classes of educational programs to determine whether a school is attempting to indoctrinate its students under the guise of secular education. Such governmental monitoring of the context of an educational program, especially on religious grounds, would raise grave questions. Concern over this potential government role was clearly the heart of the Supreme Court's entanglement analysis in the primary and secondary education cases." (J.S., p. A-18).

The findings of the lower court on the absence of excessive entanglement are clear and unequivocal:

> "The Council has shown no indication to enmesh itself unnecessarily in the recipients' affairs. The Act does not require administrative entangling, there is no entanglement in the present procedures, and no cause to speculate that the Council will redefine its responsibilities to create problems in the future." (J.S. p. A-49).

Essentially the process of confirming or verifying the accuracy of the reports submitted by the college presidents potentially calls for the Council to satisfy itself (1) that the funds were in fact spent on the programs or for the purposes reported by the colleges and (2) that those programs or purposes are not sectarian or religious in nature. The first determination was found to be quick, non-judgmental and not entangling (J.S., p. A-48). This finding belies any argument that a potential accounting relationship is necessarily entangling. If the accounting procedures required of and adopted by the institutions are totally inadequate to identify and permit ready verification of the flow of public monies, and if it is necessary for the State to conduct regular and extensive audits, then indeed the potential for excessive entanglement would be present. There is, however, simply no basis in the record below for any such determination and this Court should not speculate that such a situation may occur in the future either generally or in isolated cases.

Similarly, there is nothing in the record to indicate that excessive surveillance by the Council has occurred or ever will occur in connection with its usage verifications and its determinations that the programs or purposes for which the monies are spent are not sectarian. As noted, this is possible because of the

fundamental nature of the institutions in question and the fact that the usage reports filed by the colleges are and can be verified on the basis of the Council's general knowledge of each institution and any follow-up reports which the Council may require of particular institutions from time to time.

In short, the lower court was clearly correct and amply supported by the record in concluding that the Maryland aid program, while it may establish a continuing relationship between the Council and the State's private colleges, does not involve the State in excessive entanglement with religious institutions.[28]

F. *Political Entanglement*

This Court has previously suggested in *dicta* that the programs of aid to church-related schools may, under certain circumstances, raise constitutional questions if they have the potential for creating political divisiveness along religious lines. *Meek v. Pittenger,* ___ U.S. ___, 43 U.S.L.W. 4596, 4603 (May 19, 1975); *Committee for Public Education v. Nyquist,* 413 U.S. 756, 794-98 (1973) and *Lemon v. Kurtzman,* 403 U.S. 602, 622-24 (1971). Not only is there no basis in the record here to suggest that Maryland's program of college aid has created such divisiveness or has the potential for doing so, but an examination of this Court's expressions of concern about the problem readily indicates that this issue simply is not presented here. This is so because Maryland's annual aid allocations are based on a set

[28] The lower court quite correctly observed that the relationship established between the state and the college aid recipient in *Hunt v. McNair,* 413 U.S. 734 (1973) was "far more intimate and pervasive than any relationship likely to result" under the Maryland program (J.S., p. A-21).

formula and not on open-ended and variable annual appropriations; because the vast majority of the institutions benefitting from the Maryland program have no church ties whatsoever; and because the institutions involved are not locally based primary and elementary schools with their roots in local communities and their student bodies consisting entirely of Maryland residents.

IV.

NO HOLDING OF FACIAL UNCONSTITUTIONALITY IS JUSTIFIED.

While the appellants' complaint filed below sought a declaration that the Maryland Act was unconstitutional both on its face and as applied, the appellants have glossed over these two distinctly different forms of relief in their brief here and appear to be urging that the Maryland Act and the entire aid program be declared facially unconstitutional. Such extreme relief is simply not justified.

The entire argument advanced by the appellants is based upon the premise that aid to the appellees is constitutionally invalid because of their nature as church-related colleges. But the appellee colleges are not the only beneficiaries of State aid. No serious question has been raised here concerning the eligibility of the other fourteen colleges and universities not parties to the appeal to continue receiving public funds. Any suggestion that the entire aid program should be stricken on the basis of individual practices at, or characteristics of, one or more of the appellee institutions is the grossest kind of overkill.

Recognizing the possibility that specific grants might be ruled invalid or that particular institutions might be held statutorily or constitutionally ineligible to participate in the program, the legislature included the clearest possible severability clause in § 69 of the Maryland Act:

> "If any parts of this subtitle, or any particular payments or payments to any particular types of institutions pursuant to this subtitle, shall be held to be invalid for any reason, such unconstitutionality or invalidity shall not affect the remaining parts of this subtitle, and shall not affect any other payments or payments to any other types of institutions pursuant to this subtitle, the General Assembly hereby declaring that it would have enacted the remaining parts of this subtitle or would have authorized the remaining payments or payments to remaining types of institutions, if such unconstitutionality or invalidity had been known; and to this end, all parts, sections, and parts of sections of this subtitle, and all administrative actions pursuant to this subtitle, are declared to be severable." (J. App. 14-15)

This Court's decisions clearly establish that such severability clauses must be honored so long as any portions of a statute which may be invalidated are not so fundamental that their removal would defeat the underlying purposes. *Champlin Rfg. Co. v. Commission*, 286 U.S. 210, 234 (1932); *Sloan v. Lemon*, 413 U.S. 825, 833-34 (1973). This principle applies equally even in the absence of a severability clause. *Tilton v. Richardson*, 403 U.S. 672, 682-84 (1971).

The only circumstance under which the Court could justifiably invalidate the entire Maryland aid program is if a substantial majority of the aid recipients were found to be constitutionally ineligible to receive State funds. *Sloan v. Lemon, supra*, at 833-34. Here the appellants only challenge the right of four out of eighteen statutorily eligible colleges to receive funds,

and one of those challenged is no longer in operation. Under these circumstances, *Sloan v. Lemon* commands respect for the explicit severability clause.[29]

V.

THE APPELLEE INSTITUTIONS SHOULD CLEARLY NOT BE REQUIRED TO REFUND MONIES RECEIVED BY THEM AND EXPENDED IN GOOD FAITH RELIANCE ON THE CONSTITUTIONALITY OF THE MARLAND ACT.

Appellants' claim only a refund of a single payment made to one institution in 1974 relative to its graduate degree program and of the later disbursement of previously escrowed funds made only after the lower court had held the aid program to be constitutional. If the lower court should be reversed and the program found unconstitutional as to one or more colleges, no refund should be required.

The first payment in question was made to Loyola College after the trial of the case below and the entry of the trial judge's findings of fact. The payment was based solely on graduate degrees awarded and the college certified that the funds would be used for non-sectarian purposes and *solely in connection with its graduate program*. This case, as filed, tried and decided, involves the college level programs of the institutions in question and not the graduate level programs. No evidence was introduced and no record was established with respect to graduate level programs. The belated

[29] In the event that less than all the appellee colleges are found by this Court to be of such a nature as to render them constitutionally ineligible to receive State monies, then the severability clause and this Court's recognition of the principle which it embodies should be adhered to so as to preserve the application of the aid program to both the remaining appellee colleges and the other fourteen colleges and universities not involved in this appeal.

and unsubstantiated request, first for injunctive relief and now for a refund of that payment, was and remains totally without merit.

The second and more recent series of payments involves the funds which the State, during the two year pendency of the proceedings below, withheld from the appellee institutions not under judicial restraint but out of a responsible sense of caution and concern. These funds were paid out only after the lower court's decision in favor of the constitutionality of the Maryland Act and after the denial of appellants' requests for injunctive relief pending appeal.

The issue of refund here is controlled by this Court's decision in *Lemon v. Kurtzman*, 411 U.S. 192 (1973) [*Lemon II*]. In *Lemon II* this Court affirmed the refusal of the lower court to block payments which State officials proposed to make *after* the statute had been found *un*constitutional (in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)) but which represented reimbursement for educational services rendered before that decision. Notwithstanding the fact that the aid program there in question had been found *unconstitutional* prior to the payments, this Court ruled that State officials need not await the confirmation of a conclusive federal court ruling before implementing presumptively constitutional aid programs. As was said there:

> ". . . Until judges say otherwise, state officers — the officers of Pennsylvania — have the power to carry forward the directives of the state legislature. Those officials may, in some circumstances, elect to defer acting until an authoritative judicial pronouncement has been secured; but particularly when there are no fixed and clear constitutional precedents, the choice is essentially one of political

discretion and one this Court has never conceived as an incident of judicial review." 411 U.S. at 208.

Here the State did defer payment for a reasonable time and acted only following the favorable judicial pronouncement of a three-judge District Court. There is no reason whatsoever for disturbing that action.

The only distinction between the situation here and that presented in *Lemon II* is that, as noted there by the Court, the appellants in *Lemon II* had not sought injunctive relief pending appeal, thus allowing the Pennsylvania aid program to operate during the pendency of the appeal. The fact that the appellants here did seek (and were denied) such injunctive relief should not be considered as a controlling distinction. Of far greater importance is the application of the three basic factors which the *Lemon II* opinion suggests should control any refund determination (411 U.S. at 201-207):

1. Would any significant constitutional evils found in the Maryland program accrue if refund is not ordered?

2. Have the aid recipients relied to their detriment on their right to receive and expend the funds in question?

3. Was any ultimate ruling of unconstitutionality so clearly foreshadowed that the State could be said to have acted in bad faith in making the payments pending appeal?

Application of these criteria compels a conclusion that any refund would be altogether inappropriate here. The discussion on this point at pp. 91-93 of the brief filed on behalf of Loyola and Mount St. Mary's Colleges

is thorough and persuasive. Clearly, no conceivable constitutional evil which may be found to lurk in Maryland's aid program will be corrected by a refund, nor can it be demonstrated that any such evil will have been furthered by the payment and use of these particular monies. The reliance of the appellee colleges on their right to receive and expend the grant funds is undeniable, as is the harm they would suffer should a refund be ordered now. And the opinion of the lower court itself demonstrates the futility of any contention that a contrary result was *clearly* foreshadowed by prior decisions. Indeed, it is difficult to conceive how any decision in this uncertain First Amendment area can be characterized as clearly foreshadowed when this court has repeatedly acknowledged that the underlying tests are "not easily applied", the issues are "ones of degree" and the underlying principle of neutrality involves adherence to a "blurred, indistinct, and variable barrier."

In our view, this Court should follow its admonition in *Lemon II* that the validity of prior state action should only be made to turn on subsequent federal court rulings under the most unusual of circumstances:

> "Appellants ask, in effect, that we hold those charged with executing state legislative directives to the peril of having their arrangements unraveled if they act before there has been an authoritative judicial determination that the governing legislation is constitutional. Appellants would have state officials stay their hands until newly enacted state programs are 'ratified' by the federal courts, or risk draconian, retrospective decrees should the legislation fall. In our view, appellants' position could seriously undermine the initiative of state legislators and executive officials alike." 411 U.S. at 207-08.

CONCLUSION

For the reasons stated above, it is respectfully urged that Maryland's college aid program does not offend the First Amendment. The judgment of the District Court should be affirmed and all relief prayed by appellants should be denied.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General of Maryland,
HENRY R. LORD,
Deputy Attorney General,
GEORGE A. NILSON,
Assistant Attorney General,
Chief, Legislation and Litigation,
One South Calvert Building,
Baltimore, Maryland 21202
For State Appellees.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-730

JOHN C. ROEMER, III, EDWARD E. DOERR,
KENNETH A. STEVENS, AND
CYNTHIA KOONCE MILLER,

Appellants,

v.

BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND; MARVIN MANDEL, GOVERNOR; LOUIS L. GOLDSTEIN, COMPTROLLER; JOHN A. LUETKEMEYER, TREASURER; COLLEGE OF NOTRE DAME OF MARYLAND, INC.; MOUNT SAINT MARY'S COLLEGE; SAINT JOSEPH COLLEGE AT EMMITSBURG, MARYLAND, INC.; AND THE ASSOCIATED PROFESSORS OF LOYOLA COLLEGE OF THE CITY OF BALTIMORE, INC.,

Appellees.

ON APPEAL FROM A UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

BRIEF FOR SAINT JOSEPH COLLEGE AT EMMITSBURG, MARYLAND, INC.

GEORGE T. TYLER,
ROBERT V. BARTON, JR.,
1600 Maryland Nat'l Bank Bldg.,
Baltimore, Maryland 21202,
Attorneys for Appellee,
Saint Joseph College.

The Daily Record Co., Baltimore, Md. 21202

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-730

JOHN C. ROEMER, III, EDWARD E. DOERR, KENNETH A. STEVENS, AND CYNTHIA KOONCE MILLER,

Appellants,

v.

BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND; MARVIN MANDEL, GOVERNOR; LOUIS L. GOLDSTEIN, COMPTROLLER; JOHN A. LUETKEMEYER, TREASURER; COLLEGE OF NOTRE DAME OF MARYLAND, INC.; MOUNT SAINT MARY'S COLLEGE; SAINT JOSEPH COLLEGE AT EMMITSBURG, MARYLAND, INC.; AND THE ASSOCIATED PROFESSORS OF LOYOLA COLLEGE OF THE CITY OF BALTIMORE, INC.,

Appellees.

ON APPEAL FROM A UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

BRIEF FOR SAINT JOSEPH COLLEGE AT EMMITSBURG, MARYLAND, INC.

OPINIONS BELOW

The opinion of the District Court of three judges, Bryan J., dissenting, was issued October 16, 1974. It is set forth in the Appendix of Appellants' Jurisdictional

Statement.[1] Findings of fact were filed November 30, 1973; amended findings of fact were filed January 18, 1973 and were included by the court below as an appendix to its opinion (App. to Jur. St. 35). The opinion and findings are reported in *Roemer v. Board of Public Works of the State of Maryland,* 387 F. Supp. 1282 (D. Md. 1974). The preliminary rulings of the District Court dismissing the claims of the organizational Plaintiffs for lack of standing, and dismissing the complaint based upon the Free Exercise Clause are reported at *American Civil Liberties Union of Maryland v. Board of Public Works of the State of Maryland,* 357 F. Supp. 877 (D. Md. 1972).

JURISDICTION

Jurisdiction of the court below is grounded upon Title 28, United States Code, Section 1331. A District Court of Three judges was convened pursuant to Title 28, United States Code, Section 2281 and 2284.

Judgment against appellants was entered on October 21, 1974 in the United States District Court for the District of Maryland and notice of appeal was filed in that court by Appellants on October 25, 1974.

The jurisdiction of this Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253. Probable jurisdiction was noted by this Court on Feburary 18, 1975.

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[1] References to the Record and Appendices are cited as follows:

"App. to Jur. St." — Appendix to Jurisdictional Statement.
"App." — Single Appendix.
"Tr." — Trial Transcript.
"R" — Record.
"PX" — Plaintiffs' Exhibit.
"JX" — St. Joseph College Exhibit.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

The Maryland law involved is Chapter 626, Acts of 1971 (entitled "Aid to Non-Public Institutions of Higher Education"); as amended by Chapters 483 and 534, Acts of 1972 and Chapter 716, Acts of 1973. The statute, as amended, is codified in Article 77A, §§65-69, Annotated Code of Maryland (1975 Replacement Volume) (App. to Jur. St. 52-56).

QUESTIONS PRESENTED

I. Does the Maryland aid program have a primary effect of advancing religion and therefore violate the Establishment Clause?

II. Does the Maryland aid program cause excessive governmental entanglement with religion and therefore violate the Establishment Clause?

III. If the Maryland aid program is held to violate the Establishment Clause, should the Appellee colleges be required to pay back funds paid to them by the State?

STATEMENT OF THE CASE

This suit was brought on March 27, 1972 by the American Civil Liberties Union of Maryland, Protestants and Other Americans United for Separation of Church and State and the Appellants, four Maryland citizens and taxpayers. Plaintiffs' complaint (App. 6) alleged that the Maryland statute violated the Establishment Clause and the Free Exercise Clause of the First Amendment. Plaintiffs prayed that the statute be declared unconstitutional on its face and as applied; that the Appellee, Board of Public Works of Maryland (defendant below) be enjoined from paying aid to the Appellee colleges (defendants below); that the Appellee colleges be required to return the funds received with interest earned; and that judgment for costs in favor of Appellants be entered (App. 10).

Defendants to the suit include Appellees herein: the Board of Public Works of the State of Maryland and its three individual members; and four private church-related colleges.

The Maryland statute was enacted in 1971 and amended in 1972 and 1973. Chapter 626, Acts of 1971, effective July 1, 1971 authorized the Board of Public Works to award to private institutions of higher education meeting the criteria set forth, two hundred dollars for each associated degree granted and five hundred dollars for each bachelor's degree granted by the college. The Act provided that the college could not be an institution awarding only seminarian or theological degrees. The Act contained no restrictions as to the use of the funds granted.

The 1971 Act was amended by Chapter 534, Acts of 1972, effective July 1, 1972. The Act imposed the restriction that no funds received by the institution could be used for sectarian purposes.

The Act was further amended in 1973 by Chapter 716, Acts of 1973, effective July 1, 1973. The Act provided for awards of five hundred dollars for advanced degrees, provided that sufficient funds were appropriated in excess of sums necessary for awards for undergraduate degrees. The restrictions as to use were effective as to the graduate awards.

The court below dismissed the organizational Plaintiffs for lack of standing (App. to Jur. St. 2, n. 1), and dismissed the challenge based upon the Free Exercise Clause (App. to Jur. St. 3, n. 2).

On the merits the court below held that the original version of the statute, Chapter 626, Acts of 1971, violated the Establishment Clause because it contained no restrictions prohibiting the sectarian use of the funds (App. to Jur. St. 23). The court below denied Appellants' prayer that funds distributed under the Act be returned to the State because: (1) Suit was filed nine months after enactment of the statute and five months after payments were made; (2) The Appellees spent the funds in reliance upon the constitutionality of the Act; (3) Both *Lemon* and *Tilton* were decided after expenditure of the funds; (4) The defects in the Act were corrected in 1972 and the constitutional values to be protected by the Establishment Clause would not be furthered by a refund (App. to Jur. St. 24-25).

The court below held that the statute, as amended, was constitutional and denied Appellants' prayers for relief. The Judgment was filed October 21, 1974 (App. to Jur. St. 57-58).

The court below found the four Appellee colleges conformed closely to the defendant colleges in *Tilton v. Richardson*, 403 U.S. 672, 686 (1971) (App. to Jur. St. 10-11), and that the Appellee colleges are not so pervasively sectarian that the aid would have the primary effect of advancing religion (App. to Jur. St. 11). The court based this conclusion on the following findings:

1. St. Joseph College is "characterized by an atmosphere of academic freedom rather than religious indoctrination" (App. to Jur. St. 42).

2. Courses at St. Joseph College are taught "according to the academic requirements intrinsic to the subject matter and the individual teacher's concept of professional standards" (App. to Jur. St. 40).

3. St. Joseph College "subscribes to the 1940 Statement of Principles on Academic Freedom of the American Association of University Professors, and . . . obviously abides by it" (App. to Jur. St. 39). The teachers are subject to "no religious pressures, by anyone, on their classroom presentation or their selection of texts and course materials" (App. to Jur. St. 38).

4. At St. Joseph College there are no "quotas for membership on the governing board based on religion or membership in a religious order" (App. to Jur. St. 43). The College does not "receive aid from or make reports to an institutional church" (App. to Jur. St. 43).

5. At St. Joseph College "the great majority of students . . . are Catholic" (App. to Jur. St. 44), but "student bodies are chosen without regard to religion" (App. to Jur. St. 44).

6. At St. Joseph College "the main criteria for hiring is academic quality" and "hiring decisions are effectively low-level and participatory" (App. to Jur. St. 41).

7. St. Joseph College does not "require attendance at any religious exercise" (App. to Jur. St. 44).

8. Although St. Joseph College is "interested in encouraging spiritual interest," this encouragement does not "go beyond providing the opportunities or occasions for religious experience" (App. to Jur. St. 45), and "no aspect of the student conduct code . . . has any religious content" (App. to Jur. St. 44).

9. Although some classes at St. Joseph College begin with a prayer, "those classes which do start with prayer often do not utilize what would be called a traditional form of prayer, and students join in or not at their option" (App. to Jur. St. 39). "[T]here is no actual college policy encouraging prayer in class. It is treated as a facet of the instructor's academic freedom" (App. to Jur. St. 39). The Court below found that "a Maryland education department group which monitered the teachers education program at the College saw no evidence of religion entering into any elements of that program" (App. to Jur. St. 40).

10. St. Joseph College does "not offer majors in religion or theology" (App. to Jur. St. 45), but "certain of these courses are required" (App. to Jur. St. 46), The court below found "no indication that religious indoctrination was a goal of [St. Joseph College]" (App. to Jur. St. 13), but that religious courses "afford a congenial means of furthering the secondary objective of fostering religious experience" (App. to Jur. St. 46).

11. Although the court below found that a secondary objective of each Appellee college is to "encourage spiritual development of the students, . . ." (App. to Jur. St. 45), this finding was specifically limited. The court found, "at none of these institutions does this encouragement go beyond providing the opportunities or occasions for religious experience" (App. to Jur. St. 45).

The court below found that the administering body (The Maryland Council of Higher Education) had established procedures sufficient to safeguard the funds against use for sectarian purposes. The Council requires verification by the college, before and after use of the funds, that diversion of the funds for religious purposes will not occur (App. to Jur. St. 12). The colleges' verification of usage can be audited, if necessary, to confirm that the verified use in fact occurred (App. to Jur. St. 12).

The court below found that the use verification did not cause excessive entanglement of government with religion (App. to Jur. St. 17), citing the nature of the fund accounting which is used by Appellee colleges to comply with federal grants (App. to Jur. St. 48).

The court found that the administering body should exclude aid for the theology and religion departments of the Appellee colleges to avoid the possibility of misuse of the aid (App. to Jur. St. 12-13). The court found "no indication that religious indoctrination was a goal of these schools" (App. to Jur. St. 13), but that the funds should be so restricted absent "a clear indication that theology was taught as an academic discipline" (App. to Jur. St. 13).

At the time of trial, no funds had been disbursed under the 1972 amendment which prohibited use of funds for sectarian purposes. The funds were held in escrow (App. to Jur. St. 37, n. 2). Following the entry of judgment, Appellants moved for an injunction against payment of the escrowed funds pending this appeal. The motion was denied by the three-judge court below. Thereafter, application for injunction pending appeal was submitted to this Court and denied on November 25, 1974.

The Appellants' Jurisdictional Statement was filed December 11, 1974. This Court noted probable jurisdiction on February 18, 1975.

The Appeal as to Western Maryland College was dismissed on April 7, 1975 by motion under Rule 60 of this Court.

SUMMARY OF ARGUMENT

I.

This Court has established a three-part test to determine if public aid to church-related colleges violates the Establishment Clause. Appellants concede the Act has a secular purpose (the first part). Crucial to the determination of whether such aid has the primary effect of advancing religion (the second part) or causes excessive governmental entanglement with religion (the third part), are two factual issues: Does the aid flow to an institution where religion is pervasive? Is the aid restricted to secular and nonideological functions?

This Court has consistently examined the particular functions of Church-related institutions to determine whether public aid to those functions violates the Establishment Clause. Where religious and church-related institutions have performed secular functions of such social utility that legislatures have decided to assist those functions, this Court has upheld such aid under the Establishment Clause, notwithstanding the fact that the functions may have been motivated by religious beliefs or performed by members of a religious institution.

Aid to church-related institutions performing secular functions must be restricted to use for those functions. This Court has established two distinct standards setting forth the degree to which such statutory

restrictions must be specified. Where an aid program involves educational institutions whose religious and educational programs are inseparable, the aid must be specifically limited to particular categories of secular services, unrelated to the primary, religious-oriented educational functions. A different standard has been applied to institutions performing secular educational functions. This Court has upheld aid to such colleges where the statutory restriction contained a statement specifically forbidding use for religious purposes; no designation of a specific secular category was found to be required by the Establishment Clause where religion did not permeate the educational functions.

II.

Because the character of the recipient colleges is not pervasively sectarian, aid to these colleges does not have the primary effect of advancing religion. *Tilton v. Richardson, supra.* Administrative procedures, well established in the academic community, have been adopted to insure use for educational purposes. The court below found these proposed practices satisfactory, even though the State had not been able to demonstrate the actual use of the procedures at trial, because the restricted aid was in escow. Appellants' objections as to prior use of funds pertain to funds distributed under the original Act, which did not contain restrictions as to sectarian use.

St. Joseph College is an autonomous college and is neither controlled by any church or religious organization, nor subject to any religious quotas for Board membership. There are no religious restrictions or criteria in recruiting or hiring faculty. There are no religious restrictions or criteria in admitting students or awarding financial aid. Religious activities are

limited to non-compulsory opportunities or occasions for religious experience. There is no College policy encouraging prayer in the classroom, but it occurs on a voluntary basis. The Theology Department does not attempt to inculcate religious values. The College abides by established principles of academic freedom. Religion does not permeate the cultural and social aspects of the College. Providing a secular education is the predominant purpose of St. Joseph College.

The statutory language of the Maryland Act is very similar to the statute approved by this Court in *Tilton, supra.* Seminaries are ineligible. Aid cannot be used for sectarian activities. The Court below construed the Act to forbid aid to theology departments, a requirement similar to a restriction in the *"Tilton* statute".

The administration of the Act requires that the use of the aid for non-sectarian purposes be designated, under oath, by the college President, a procedure similar to the grant application procedure approved in *Tilton. Tilton v. Finch, infra.* Follow-up by verification of the use is required, and, if necessary, a simple audit can be required. A method of fund accounting is presently used by the colleges to meet the requirements of many federal grants and programs and the colleges are experienced with this method.

The fact that the Maryland Act does not specify particular educational purposes for the aid is as constitutionally insignificant as the fact that the *"Tilton* statute" did not specify the particular educational use of the facility or the educational activities to take place within the facility except to the extent of excluding sectarian uses. The Establishment Clause requires exclusion of use for religious purposes, not a classification of the particular educational purposes.

III.

Unlike a church elementary school, religion does not so permeate the fabric of the educational programs at the recipient colleges so to require the State to scrutinize the daily operations of the institution to "weed out" religion from educational functions. The religious functions at the colleges are limited and identifiable and can be excluded from State aid by the established practice of designation, verification under oath, and fund accounting. Even though the aid is continuing, the nature of the schools does not require a continuous intensive surveillance of the colleges. Surveillance, not a mere continuous relationship, causes entanglement. Continuing relationships with educational institutions already exist in the form of governmental requirements for licensure, accreditation and grant programs.

Political entanglement will not result from the Maryland aid program, as the church-related colleges are a small percentage of the private colleges receiving aid.

IV.

The principles of *Lemon II, infra,* require that St. Joseph College not be required to return funds received under the Act, even if the Act is held to violate the Establishment Clause. The College has relied upon the Maryland legislature, the Maryland Governor and Board of Public Works, a three judge federal court and this Court which refused to enjoin disbursement of the funds. If this Court holds the Maryland program to be unconstitutional, such a decision was not foreshadowed when the aid was paid by the State. The aid was paid after a District Court of three judges applied the established principles of this Court and found the program constitutional. Repayment of the funds will

not remedy "advancement of religion", if any, or "entanglement" if any, which has already occurred and is not necessary to protect constitutional principles upon which any holding of unconstitutionality might be based.

ARGUMENT

I.

THIS COURT HAS UPHELD PUBLIC AID TO CHURCH-RELATED COLLEGES WHERE THE COLLEGES WERE NOT PERVASIVELY SECTARIAN AND WHERE THE AID WAS RESTRICTED FROM USE FOR RELIGIOUS ACTIVITIES.

In judging the constitutionality of various forms of public assistance to church-related educational institutions, this Court has applied the three-part test stated in several recent Establishment Clause cases. *Meek v. Pittenger,* 43 U.S.L.W. 4596 (No. 73-1765, May 19, 1975); *Committee for Public Education and Religious Liberty v. Nyquist,* 413 U.S. 756 (1973); *Levitt v. Committee for Public Education & Religious Liberty,* 413 U.S. 472 (1973); *Sloan v. Lemon,* 413 U.S. 825 (1973); *Hunt v. McNair,* 413 U.S. 734 (1973); *Tilton v. Richardson,* 403 U.S. 672 (1971); *Lemon v. Kurtzman,* 403 U.S. 602 (1971).

> "First, the statute must have a secular legislative purpose. [Citation omitted]. Second, it must have a 'primary effect' that neither advances nor inhibits religion. [Citation omitted]. Third, the statute and its administration must avoid excessive government entanglement with religion." *Meek v. Pittenger, supra,* 43 U.S.L.W. 4596, 4598.

Appellants do not contest the conclusion of the court below that "the statute was enacted with a secular purpose" (App. to Jur. St. 9). Appellants do question the holdings of the court below "that the statute has not

had the primary effect of advancing or inhibiting religion" (App. to Jur. St. 9); and that the "relationship between church and state which results from this aid program is not entangling" (App. to Jur. St. 17).

In each case reviewed by this Court, the "primary effect" and "entanglement" issues turned upon (a) the nature of the institution and (b) the nature of the aid.

The first pivotal issue of fact is whether the recipient institution is pervasively sectarian.

> "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which *religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.*" *Hunt v. McNair, supra,* 413 U.S. 734, 743 (emphasis supplied).
>
> "The Court's opinion in *Lemon* and the plurality opinion in *Tilton* are grounded on the proposition that the degree of entanglement arising from inspection of facilities as to use *varies in large measure with the extent to which religion permeates the institution.*" *Hunt v. McNair, supra,* 413 U.S. 734, 746 (emphasis supplied).

The second pivotal issue of fact is whether the character of the aid is restricted to use for "secular" and nonideological" purposes. *Tilton v. Richardson, supra,* 403 U.S. 672, 679; *Committee for Public Education and Religious Liberty v. Nyquist, supra,* 413 U.S. 756, 780.

A. This Court Has Consistently Examined The Particular Functions Of Church-Related Institutions To Determine Whether Public Aid To That Function Violates The Establishment Clause.

Although the three-part test was first stated in *Tilton* and *Lemon,* the examination of the nature of church-related institutions receiving governmental assistance is not new to this Court in Establishment Clause cases.

In *Bradfield v. Roberts,* 175 U.S. 291 (1899), this Court upheld an Act of Congress appropriating funds to be paid to Providence Hospital for the construction of a building to house poor patients with contagious diseases. The hospital was owned and operated by the Sisters of Charity of Emmitsburg, Maryland. The Court's holding was based upon its finding that the function of the institution was not religious:

> "The above-mentioned allegations in the complainant's bill do not change the legal character of the corporation or render it on that account a religious or sectarian body. Assuming that the hospital is a private eleemosynary corporation, the fact that its members, according to the belief of the complainant, are members of a monastic order or sisterhood of the Roman Catholic, and the further fact that the hospital is conducted under the auspices of said church, are wholly immaterial, as is also the allegation regarding the title to its property. The statute provides as to its property and makes no provision for its being held by anyone other than itself. *The facts above stated do not in the least change the legal character of the hospital, or make a religious corporation out of a purely secular one as constituted by the law of its being.* Whether the individuals who compose the corporation under its charter happen to be all Roman Catholics, or all Methodists, or Presbyterians, or Unitarians, or members of any other religious organization, or of no organization at all, is of not the slightest consequence with reference to the law of its incorporation, nor can the individual beliefs upon religious matters of the various incorporators be inquired into. Nor is it material that the hospital may be conducted under the auspices of the Roman Catholic Church. To be conducted under the auspices is to be conducted under the influence or patronage of that church.

The meaning of the allegation is that the church exercises great and perhaps controlling influence over the management of the hospital. It must, however, be managed pursuant to the law of its being. That the influence of any particular church may be powerful over the members of a nonsectarian and secular corporation, incorporated for a certain defined purpose and with clearly stated powers, is surely not sufficient to convert such a corporation into a religious or sectarian body. That fact does not alter the legal character of the corporation, which is incorporated under an act of Congress, and its powers, duties, and character are to be solely measured by the charter under which it alone has any legal existence. There is no allegation that its hospital work is confined to members of that church or that in its management the hospital has been conducted so as to violate its charter in the smallest degree. *It is simply the case of a secular corporation being managed by people who hold to the doctrine of the Roman Catholic Church, but who nevertheless are managing the corporation according to the law under which it exists.* The charter itself does not limit the exercise of its corporate powers to the members of any particular religious denomination, but, on the contrary, those powers are to be exercised in favor of anyone seeking the ministrations of that kind of an institution. All that can be said of the corporation itself is that it has been incorporated by an act of Congress, and for its legal powers and duties that act must be exclusively referred to. As stated in the opinion of the court of appeals, *this corporation 'is not declared the trustee of any church or religious society.* Its property is to be acquired in its own name and for its own purposes; that property and its business are to be managed in its own way, subject to no visitation, supervision, or control by an ecclesiastical authority whatever, but only to that of the government which created it. In respect, then, of its creation, organization, management, and ownership of property it is an

ordinary private corporation whose rights are determinable by the law of the land, and the religious opinions of whose members are not subjects of inquiry'." 175 U.S. 291, 297-99 (emphasis supplied).

The *Bradfield* case is similar to the case at hand in another respect. The plaintiff alleged that the hospital had a "sectarian character" 175 U.S. 291, 292, but failed to prove his allegation:

> "If we were to assume, for the purpose of this question only, that under this appropriation an agreement with a religious corporation of the tenor of this agreement would be invalid, as resulting indirectly in the passage of an act respecting an establishment of religion, we are unable to see that the complainant in his bill shows that the corporation is of the kind described, but on the contrary he has clearly shown that it is not." 175 U.S. 291, 297.

While the *Bradfield* case is not controlling here, it illustrates that where a church-related institution performs a secular work of such social utility that the legislature has decided to assist the work, the applicable criteria in applying the Establishment Clause requirements is the nature of the work, not the religious motivation for the work nor the religious beliefs of the corporate members undertaking the work.

This Court has been faithful to this criteria in *Tilton, Lemon* and the subsequent Establishment Clause cases. It has scrutinized the work and proceeded from that finding to define the Establishment Clause "lines of demarcation." *Lemon v. Kurtzman, supra,* 403 U.S. 602, 612.

The case of *Walz v. Tax Commission,* 397 U.S. 664, (1970) provides a direct and recent confirmation that

religious organizations, even churches, are not, by reason of their religious beliefs and activities, barred from receiving governmental aid (tax-exempt status) as a result of their function of providing "beneficial and stabilizing influences in community life" and fostering "moral and mental improvement" in a "harmonious relationship to the community at large". 397 U.S. 664, 672-73. Significantly, this Court upheld the functional classification of property owned by religious corporations as within "a broad class of property owned by non-profit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historic, and patriotic groups." 397 U.S. 664, 673.

Mr. Justice Douglas, dissenting, in *Walz,* recognized and supported the functional distinction between a religious organization performing secular, as opposed to sectarian, activities.

> "The church *qua* church would not be entitled to that support from believers and from non-believers alike. Yet the church *qua* nonprofit, charitable institution is one of many that receive a form of subsidy through tax exemption." 397 U.S. 664, 707.

Mr. Justice Douglas' dissent was based upon the failure of the statute to provide tax exempt status for organizations of non-believers as well as churches. He felt that this exclusion violated governmental neutrality toward religion required by the Establishment Clause.

Mr. Justice Brennan, concurring, expressed the functional distinction in terms of "principal effect":

> "Against the background of this survey of the history, purpose, and operation of religious tax exemptions, I must conclude that the exemptions do not 'serve the essentially religious activities of religious institutions'. Their principal effect is to

carry out secular purposes — the encouragement of public service activities and of a pluralistic society. During their ordinary operations, most churches engage in activities of a secular nature that benefit the community; and all churches by their existence contribute to the diversity of association, viewpoint, and enterprise so highly valued by all of us." 397 U.S. 664, 692-93.

> "The means churches used to carry on their public services activities are not 'essentially religious' in nature. They are the same means used by any purely secular organization — money, human time and skills, physical facilities. It is true that each church contributes to the pluralism of our society through its purely religious activities, but that state encourages these activities not because it champions religion *per se* but because it values religion among a variety of private, nonprofit enterprises that contribute to the diversity of the Nation." 397 U.S. 664, 693.

The opinions expressed by both the majority and dissenting Justices in *Walz,* emphasize the functional distinctions the Supreme Court has historically recognized in determining what is "religion" for purposes of applying the Establishment Clause. *Walz,* establishes that governmental aid to functions which are non-religious is not precluded by the Establishment Clause, merely because the functions are motivated by religious beliefs or carried out by religious organizations.

This Court has stated and followed the "function" criteria in the most recent public aid to private education cases beginning with *Tilton* and *Lemon.* In each case where the Court found the function to be predominantly educational, the aid program was upheld. *Tilton v. Richardson, supra; Hunt v. McNair, supra.*

In *Tilton* and *Hunt*, this Court found that the facts supported its observation that "college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines." *Tilton v. Richardson, supra,* 403 U.S. 672, 686.

> "On the record in this case there is no basis to conclude that the College's operations are oriented significantly towards sectarian rather than secular education." *Hunt v. McNair, supra,* 413 U.S. 734, 744.
>
> "In short, the evidence shows institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education." *Tilton v. Richardson, supra,* 403 U.S. 672, 687.

In each case where the educational functions were pervaded by religious functions, the aid program was struck down. *Meek v. Pittenger, supra; Committee for Public Education and Religious Liberty v. Nyquist, supra; Levitt v. Committee for Public Education and Religious Liberty, supra; Sloan v. Lemon, supra; Lemon v. Kurtzman, supra.*

Indeed the most recent case before this Court is replete with references to the religious character of the schools. See 43 U.S.L.W. 4596, 4600-02.

> "But we agree with the appellants that the direct loan of instructional material and equipment has the unconstitutional primary effect of advancing religion *because of the predominantly religious character of the schools benefiting from the Act.*" *Meek v. Pittenger, supra,* 43 U.S.L.W. 4596, 4600 (emphasis supplied).

The nature of the function receiving public assistance is not only a crucial fact in itself, in applying the "primary effect" and "entanglement" tests, it is also critical in evaluating the second crucial fact — the degree to which the aid must be restricted.

B. While This Court Has Required Public Aid Involving Pervasively Sectarian Institutions To Be Specifically Categorized And Narrowly Prescribed, It Has Required Aid To Institutions With Secular Educational Programs To Be Limited Only By Negative Restrictions Preventing Use For Religious Purposes.

In evaluating the nature of public aid to private educational institutions, this Court has established two standards specifying the degree to which public aid to private schools must be restricted: one standard applicable to aid programs involving pervasively sectarian schools; and a second standard for aid to colleges whose functions are predominantly educational.

Aid involving pervasively sectarian schools may include programs "made available to all students" and may include "church-related schools in programs providing bus transportations, school lunches, and public health facilities — secular and nonideological services *unrelated to the primary, religious-oriented educational function* of the sectarian school." *Meek v. Pittenger, supra,* 43 U.S.L.W. 4596, 4600 (emphasis supplied).

The reason why the aid must be restricted from the educational function of the religious schools is because "it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role [of these schools]". *Meek v. Pittenger, supra,* 43 U.S.L.W. 4596, 4601.

While aid to pervasively sectarian schools must be categorized to meet the narrowly prescribed programs upheld in *Meek v. Pittenger, supra; Board of Education v. Allen,* 392 U.S. 236 (1968); and *Everson v. Board of Education,* 330 U.S. 1 (1947); no such specific categorization is necessary in schools whose predominant purpose is to provide a secular education. In such schools, religion does not pervade the educational programs and religious functions are separate and identifiable.

This Court has held that negative restrictions prohibiting aid for sectarian purposes are sufficient to safeguard the Establishment Clause prohibition in aid programs to church-related colleges which are not pervasively religious, *Tilton v. Richardson, supra; Hunt v. McNair, supra;* and therefore there is no Establishment Clause requirement that the aid program further specify the particular categories of the secular educational programs which may receive aid.

This Court has repeatedly held that where public aid is appropriately restricted to use for educational purposes, the fact that religious programs may indirectly benefit does not violate the Establishment Clause. *Meek v. Pittenger, supra,* 43 U.S.L.W. 4596, 4600; *Hunt v. McNair, supra,* 413 U.S. 734, 742-43.

Where the predominant function of a church-related college is to provide a secular education, and where aid to the college is restricted from use for religious purposes, the mechanical application of the Establishment Clause tests prescribed by this Court compels the conclusion that there is no primary effect of advancing religion, and there is no governmental entanglement with religion.

II.

THE MARYLAND AID PROGRAM DOES NOT HAVE THE PRIMARY EFFECT OF ADVANCING RELIGION.

In order to sustain Appellants' contention that public aid to the Appellee colleges has the primary effect of advancing religion, Appellants must prove that "religion so permeates the secular education provided by church-related colleges and universities that their religious and secular educational functions are in fact inseparable." *Tilton v. Richardson, supra,* 403 U.S. 672, 680. See *Hunt v. McNair, supra,* 413 U.S. 734, 743.

A. The Maryland Aid To St. Joseph College Does Not Advance Religion Because The College Is Not Pervasively Sectarian.

The court below held that neither St. Joseph College nor the other Appellee colleges are "pervasively sectarian" (App. to Jur. St. 10-11) and this finding is buttressed by the evidence.

The Court below found that the Appellee colleges conform closely to the colleges in *Tilton* (App. to Jur. St. 10-11). Appellants, however, contend that the Appellee colleges are "sectarian" (Appellant's Brief, pp. 74-75). Because Appellants base their contention upon conclusions unsupported by the evidence, it is necessary to set forth at length the factual basis of the trial court's findings:

1. As to institutional autonomy the trial court concluded: "The defendant Maryland schools are characterized by a high degree of institutional autonomy. The affiliated institutions exercise no control over the budget or policies of the schools." (App. to Jur. St. 11, n. 7).

The following facts support this conclusion as to St. Joseph College:

The purpose of St. Joseph College, as stated in its charter and by-laws, is to operate a four year collegiate program of education and to award degrees (Tr. 52; JX 1, p. 1, Tr. 51; JX 3, p. 1, Tr. 51). There are no statements in the corporate charter, corporate by-laws, or administrative by-laws referring to the Catholic Church or any religious denomination or belief (JX 1, Tr. 51; JX 2, Tr. 51; JX 3, Tr. 51). The charter, corporate by-laws and administrative by-laws provide that the affairs of St. Joseph College shall be managed by a Board of Trustees and that all powers of the corporation are vested in the Board of Trustees (JX 1, p. 2, Tr. 51; JX 2, p. 1, Tr. 51; JX 3, p. 1, Tr. 51). An Associate Board is appointed by the Board of Trustees and is responsible for advising the President (Tr. 91-2; JX 2, pp. 3-4, Tr. 51; JX 3, p. 1, Tr. 51). There is no requirement or policy in the corporate charter, by-laws, or any corporate documents that the Trustees, Associate Trustees, administrative officers, faculty or any member or percentage of members thereof, be Catholic, belong to any religious order or organization, or hold any position with any religious order or organization (Tr. 88-89; JX 1, Tr. 51; JX 2, Tr. 51; JX 3, Tr. 51). St. Joseph College does not receive any financial assistance from the Catholic Church, any archdiocese, or any financial committee or entity representing the Catholic Church (Tr. 89, 125). The Board of Trustees, Associate Board, administrative officers and faculty of St. Joseph College are not required, by corporate charter, by-laws or any other document, to report to, account to or in any manner be responsible to the Catholic Church, any religious organization or any members thereof (JX 1, Tr. 51; JX 2, Tr. 51; JX 3, Tr. 51). The Board of Trustees, administrative officers and faculty of St. Joseph College, in fact, have not been required and do not report to, account to, and in no manner are they responsible to the Catholic Church or any religious organization external to the College (Tr. 78-79, 88, 114, 125, 134, 174, 646-47). The President of St. Joseph College testified that the Daughters of Charity of St. Vincent De Paul, (her religious community), "in no way whatsoever . . . have anything to do with the internal running of St. Joseph College" (PX 21, p. 4, Tr. 49). The President testified that the Board of Trustees, in fact makes all of the policy decisions of the College (Tr. 79). The President testified that no member of the Daughters of Charity or any other organization outside of the College has attempted to influence her in her duties as President (Tr. 78). The President testified that, in fact, she is accountable only to the Board of Trustees in the discharge of her professional responsibilities (Tr. 78). She testified that there were "no strings attached" to the financial assistance received by the College from the Daughters of Charity of St. Vincent De Paul (Tr. 125).

2. As to the absence of religious restrictions in faculty hiring, the court below found that academic qualifications were the main criteria for hiring faculty and that there was no religious bias in selecting faculty (App. to Jur. St. 41).

Appellants' contention that there are "religious restrictions on faculty appointments" is not supported by the record.

The testimony of the President of the College is explicit on the point:

> "Q. Are applicants for faculty appointments required to state their religion? A. No, they are

not. When they write to us, they present a resume. Sometimes their religion is on it; sometimes it is not, but we don't inquire into it. Q. In discussing their qualification for appointment, do you ever consider the religion of a particular applicant? A. No. I think the important thing is their professional competence." (Tr. 79, 80).

The President testified that the College imposed no religious restrictions upon the hiring of faculty to teach theology courses (Tr. 117-19; See also Tr. 96, 244-45).

3. As to the absence of religious restrictions on student admissions, the trial court found that "thorough analysis of the student admission and recruiting criteria of each defendant demonstrates that the student bodies are chosen without regard to religion." (App. to Jur. St. 44).

Appellants maintain that St. Joseph College has perpetuated "de facto religious restrictions" on student admissions by concentrating recruiting efforts largely toward students of a particular faith (Appellants' Brief, pp. 66-67). This contention is not supported by the evidence.

The evidence shows that St. Joseph College had a policy of recruiting at public high schools (PX 21, pp. 94-95, Tr. 49) and, in fact, that of the high schools visited, *87% were public high schools* (JX 32, last page, Tr. 51). The 87% figure was produced by an examination of recruiting records requested by Appellants at trial (Tr. 384-85).

The evidence showed that there are no religious requirements or religious criteria used in determining student admissions (Tr. 90, 157-58) or granting financial aid (Tr. 91, 319) and that this policy is set forth in the College catalog (PX 1, p. 5, Tr. 51).

There are no religious restrictions on student admissions at St. Joseph College, *de facto* or otherwise.

4. As to religious activities, the Appellants contend that the trial Court found that "one secondary objective" of the Appellee colleges was "to encourage spiritual development of the students" and that "some of the defendants seem more caught up in this idea than others . . ." (Appellants' Brief, p. 20).

But the finding of the trial Court states in full:

> "Though some of the defendants seem more caught up in this idea than others, *at none of these institutions does this encouragement go beyond providing the opportunities or occasions for religious experience.*" (App. to Jur. St. 45, emphasis supplied).

The evidence is overwhelming that such occasions and opportunities for religious worship are purely voluntary, and no pressure is placed on students or faculty to attend (See App. to Jur. St. 44; Tr. 90, 92, 93, 101, 150, 159-61).

The trial court found that "no aspect of the student conduct code has any religious content" (App. to Jur. St. 44). The evidence is clear that there are no religious inhibitions imposed on any aspect of student life at St. Joseph College (Tr. 60, 61, 136-39, 140-43, 146-49, 153-54).

5. As to prayer in classrooms, the trial court found that there is no policy encouraging prayer in classrooms at the Appellee colleges, but that some individual instructors do so as a facet of their academic freedom (App. to Jur. St. 39; See Tr. 42, 119-21, 211, 255).

The trial court relying upon the atmosphere of academic freedom existing at the College, and upon the

testimony of a Maryland Department of Education staff member thoroughly familiar with the college,[2] characterized the effect of such prayers as "peripheral":

> "In fact, at St. Joseph's College, the only defendant at which a majority of classes start with prayer, a Maryland education department group which monitored the teachers education program at the College saw no evidence of religion entering into any elements of that program. It appears that prayer in class is as peripheral to the subject of religious permeation of an institution as are the facts that some instructors wear clerical garb, and some classrooms have religious symbols. None of these facts impairs the clear and convincing evidence that courses at each defendant are taught 'according to the academic requirements intrinsic to the subject matter and the individual teacher's concept of professional standards.' *Tilton v. Richardson, supra,* 403 U.S. 681." (App. to Jur. St. 40).

6. As to the Theology Department, the trial court found that it was "unable to characterize the manner in which theology and religious courses are conducted." (App. to Jur. St. 42).

Appellants, however, ignore the fact that they offered no proof on the point, and assert the "non-finding" as a statement of the existence of a "characteristic". (Appellants' Brief, p. 69).

In this Court, Appellants argue the same facts that failed to convince the trial court that any inculcation of religious values took place at St. Joseph College. The facts asserted by Appellants consist of phrases contain-

[2] The staff member evaluated the teacher education program at St. Joseph College, for purposes completely unrelated to the Maryland Act before this Court. The evaluation involved extensive monitoring of virtually the entire academic program (Tr. 354-80).

ing theological terminology elicited in answer to counsel's examination concerning the personal religious beliefs of the witnesses and the meanings of certain theological concepts (App. to Jur. St. 70-71).[3] The fact that theology courses contain such subject matter and concepts does not mean that the teachers inculcate these concepts. Such an analysis would hold a political science professor to be a communist for teaching about Marxism.

The evidence is that religious concepts are taught as academic disciplines without subjecting students to an indoctrination based upon the teacher's personal beliefs, or the beliefs of any particular religion.

Testimony by a member of the curriculum committee, which defined the purposes and objectives of the theology courses of study, showed that the committee regarded theology as an academic discipline and that the committee treated it as such (Tr. 196-97). The committee applied professionally accepted guidelines to the development of the theology course of study (Tr. 201-04). The committee established as goals of the Theology Department to introduce students to the methodology of the subject and to understand all sides of the issues presented in order to properly evaluate any point of view (Tr. 193, 204; JX 8; p. 18, Tr. 51). The committee designed the theology program with the presumption, based on the committee's knowledge of the faculty, that the courses would be taught objectively as a discipline according to accepted professional standards (Tr. 228-29).

The emphasis of providing students with the academic tools of inquiry was supported by a written

[3] References to the testimony on this point are collected in Appendix A to [Post-Trial] Brief of St. Joseph College, R. 1527, 1539-52.

statement of the President emphasizing the need to explore other philosophies and beliefs in a questioning and decision making process (Tr. 57; JX 26, p. 5, Tr. 51).

The testimony of the Chairman of the Theology Department was as follows:

> "Q. Just from your own viewpoint and experience as a teacher, do you consider the college classroom a proper or appropriate forum or place for a teacher to advocate his or her particular personal religious beliefs? A. Oh, no, they wouldn't pay attention today if you did. They all have their own ideas concerning things today. No, we don't.
>
> Q. You don't consider this is a proper place for it? A. No, I don't." (PX 22, p. 20, Tr. 49).

It is significant that in the Appellants' Brief, in citing the Chairman's testimony as to the purpose of the Theology Department, the quotation is cut off in mid-sentence (Appellants' Brief, p. 70). The remainder of the sentence illustrates that the Department has the purpose of teaching the similarities between religions and the common bonds of people in our society resulting therefrom:

> ". . . since Scripture is the bridge between people of all denominations, to probably make them understand what a powerful source it would be for humanism, I mean, because the non-Catholics and ourselves do believe about the same things with regard to Scripture, both Old and New Testament, the scriptural exegesis, whether they are Protestant or Catholic, usually hold the same thing.
>
> So, it's a good field for promotiong conversation among other groups and making them feel our sense, our bond of unity. There are more things that unite us than separate us with other groups." (PX 21, p. 5, Tr. 49).

The Chairman of the Theology Department testified that most of the courses emphasized the study of Christian beliefs, but that the department offered courses studying a variety of religious beliefs and subjects (PX 22, pp. 11-13, Tr. 49). The College sponsored a seminar in "Contemporary Theology", inviting clergymen and scholars of a variety of beliefs to lecture at the College (PX 22, pp. 7-9, Tr. 49). The College library makes available to students treatises, references and resources on a variety of religions and religious topics (PX 22, p. 19, Tr. 49).

There was unrebutted testimony that all of the courses taught in the Theology Department were taught as academic disciplines and that there was no attempt to indoctrinate students (Tr. 151-52, 196-98, 228-29; PX 22, p. 20, Tr. 49).

The colleges presented expert testimony that the offering of courses in religion has greatly expanded among private and public colleges since World War II and that the teaching of religion is generally viewed by the academic community as an academic discipline (Tr. 1634-35); that the study of religion is a common and natural area of study in a liberal arts curriculum because religion is a significant aspect of human experience (Tr. 1638); that in the United States, the emphasis in the study of religion has been on the study of the Christian tradition because of the historical and cultural affinities of the Western Hemisphere (Tr. 1638); and that the study of Scripture and theological methodology are typical in the academic study of religion (Tr. 1636-38).

The finding of the trial court that there is a possibility for deepening religious experiences in a particular faith at the colleges because religious

teachers teach religious subjects (App. to Jur. St. 13) is a far cry from Appellants' unfounded assertion that inculcation of religious values is a fact at St. Joseph College, particularly when the evidence shows that it was not, and the trial court generally found that ". . . religious indoctrination is not a substantial purpose or activity of any of these defendants" (App. to Jur. St. 47).

7. As to academic freedom, the finding of the trial court that complete academic freedom existed at St. Joseph College, with respect to faculty and students (App. to Jur. St. 11, 38, 40-42) is unchallenged by Appellants in this forum.

8. As to the curriculum, the trial court found that ". . . these schools perform essentially secular educational functions . . . religion does not permeate the secular educational functions of these schools." (App. to Jur. St. 14).

It was stipulated that Saint Joseph College is an undergraduate liberal arts college granting Bachelors of Arts and Bachelors of Science degrees in the major fields of biology, chemistry, education, English, government history, mathematics, social welfare, Spanish, French, home economics and nursing (Tr. 52). More than 75% of the graduates of the College major in education, nursing and social work (Tr. 53). The College is accredited by the Maryland State Board of Education and the Middle States Association of Colleges and Secondary Schools (PX 1, p. 83, Tr. 49). Its teacher education program is accredited by the Maryland State Department of Education, Division of Certification and Accreditation of Teacher Education (Tr. 355, 360). Its social work program is accredited by the Council on Social Work Education (JX 11, p. 1, Tr. 51). Its nursing

program is accredited by the Maryland State Board of Examiners of Nurses (JX 41, Tr. 51) and the National League for Nursing (JX 1, p. 83, Tr. 51). Seven national honor societies maintain local chapters at the College (Tr. 53-54). The College maintains membership in eleven national and regional professional academic associations (Tr. 83-84; PX 1, p. 83, Tr. 49).

Testimony of the President and various faculty members showed that there are no restrictions other than accepted standards of professional conduct, on the subject matter taught or the manner in which the subject is taught (Tr. 72, 270, 278, 279, 345). Each faculty member writes his own course outline (Tr. 72, 245). There are no restrictions or censorship in the selection of textbooks or ordering and using library resources (Tr. 72, 89, 245, 345, 347). Faculty members testified that they felt free to teach subject areas which might be considered "controversial" with respect to the Catholic Church (Tr. 248-49, 262-65, 275-79, 346).

The facts and evidence in this case support the findings of the court below that St. Joseph College is not pervasively sectarian.

Given the nature of the Appellee colleges, the Maryland Act does not have the primary effect of advancing religion unless the Act, or its administration, fail to restrict the aid to the Constitutionally permissible purposes.

B. The Maryland Act Prohibits Aid For Sectarian Purposes And The State Has Established Procedures To Enforce the Restrictions.

The court below described the administrative mechanism by which the Maryland Council for Higher Edu-

cation proposed to implement the statutory restrictions on sectarian use:

> "The Act prescribes two levels of screening. The first is a pre-eligibility determination based primarily on the Act's requirement that aid not go to institutions awarding primarily theological or seminary degrees. Several institutions have been disqualified in this manner, and there has been no serious suggestion that institutions found eligible violate the standard, or that this determination entangles the Council in religion.
>
> "The second level of screening is a determination of whether state funds have been improperly used. After the program was in operation and one year's funds awarded, the statute was amended to prohibit the use of state funds for 'sectarian purposes.' Chap. 534, 1972 Laws of Maryland, Art. 77A, § 68A, Annotated Code of Maryland (1969 Replacement Vol.). That statutory stricture is implemented through requirements of verfication by the college president before receipt that funds will not be improperly expended, and verification one year thereafter that funds have not been improperly used. The Council requires sufficient detail, through follow-up on the usage description which accompanies the second verfication, to determine whether the expenditure was for sectarian use. (The pre-amendment funds awarded for degrees conferred during the 1970-1971 academic year were never subjected to this second level of screening.)
>
> "The usage verification and the normal annual accounting which each college conducts obviate the need for post-audit analysis in every case. Such analysis is available when needed, however. State auditors could accomplish a post-audit analysis, using accepted accounting techniques, in one day or less" (App. to Jur. St. 47-48).

Appellants continue to maintain that the Maryland aid is "undefined" and "virtually unlimited" (Appellants' Brief, p. 22). It is therefore necessary to set forth at length the compelling parallels between the Maryland program and the aid program upheld by this Court in *Tilton*.

1. *The Statutory Restrictions*

The restrictive clauses of the Higher Education Facilities Act of 1963, 77 Stat. 364, as amended, 20 U.S.C. §§ 711-721 (1964 ed. and Supp. V), upheld in *Tilton* and the Maryland Act would be difficult to distinguish, but for the citations.

> "[A]ny facility used or to be used for sectarian instruction or as a place for religious worship, or . . . any facility which . . . is used or to be used primarily in connection with any part of the program of a school of department of divinity . . ." *Tilton v. Richardson, supra,* 403 U.S. 672, 675.
>
> "None of the monies payable under this subtitle shall be utilized by the institution for sectarian purposes." Maryland Annotated Code, Article 77A, § 68A (App. to Jur. St. 54).
>
> "The institution cannot be one awarding only seminarian or theological degrees; . . ." Maryland Annotated Code, Article 77A, § 66(d) (App. to Jur. St. 53).

The statute upheld in *Hunt* contained similar restrictive language.

> "[A]ny facility used or to be used for sectarian instruction or as a place of religious worship nor any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity for any religious denomination." *Hunt v. McNair,* 413 U.S. 734, 736-37.

The conclusions of the Appellants that the aid considered in *Tilton* was "narrowly limited" while the aid under the Maryland Act is "virtually unlimited

[and] undefined" must be based upon a Constitutional subtly not apparent from a comparison of the printed word (See Appellants Brief, p. 22).

The fact that the Maryland Act does not specify particular educational purposes for the aid is as constitutionally insignificant as the fact that the "*Tilton* statute" did not specify the particular educational use of the facility or the educational activities to take place within the facility except to the extent of excluding sectarian uses.

There are two differences in the statutory restrictions, however, one of which the court below held not to reach constitutional dimensions, and one of which was removed by judicial construction.

The *Tilton* and the *Hunt* programs provided aid for the construction of "facilities." As the court below pointed out, the only limitations on the purpose of the facilities and the activities carried on in the facilities was the restrictive language similar to that of the Maryland Act:

> "The Maryland aid program is characterized by direct non-categorical grants restricted by a prohibition on use for sectarian purposes. Leaving aside the question of the efficacy of this prohibition, the differences between this program and the *Tilton* program are more apparent than real. In *Tilton* direct grants were available for the construction of virtually any type of building, subject to similar prohibitions against sectarian usage. Thus, the *Tilton* funds were used to construct two libraries, a music, drama and arts building, a science building and a language laboratory. Every non-sectarian program in the defendant colleges could be benefited by the federal aid program, and the difference between the *Tilton* aid program and the Maryland aid program thus resolves itself into a difference

> between construction grants and non-categorical grants. Clearly the latter distinction does not rise to constitutional dimensions." (App. to Jur. St. 17).

The second distinction is that in *Tilton*, the statute forbade aid "to be used primarily in connection with any part of the program of a school *or department of divinity,*" while the parallel Maryland statutory restriction forbids aid to *institutions* awarding only seminarian or theological degrees. While St. Joseph College does not have a department of "divinity" it does have a Department of Theology (but does not recognize a "major" in theology), and the court below construed the statute as excluding aid to this department. This construction in effect reconciles the Maryland Act with the similar restriction in the *"Tilton* statute".

2. *The Administrative Process*

In administration, the Maryland aid program initially eliminates from eligibility colleges which primarily award theological degrees (App. to Jur. St. 18). As to the eligible colleges, the president must verify, under oath, before and after receipt of the funds that they will be used for purposes permitted by the statute (App. to Jur. St. 48). The State administering body "requires sufficient detail, through follow-up on the usage description which accompanied the second verification, to determine whether the expenditure was for sectarian use" (App. to Jur. St. 48).

Once the use made of the aid is identified by the college and approved by the administering body, an auditing procedure is available, if required, to verify that the funds are used for the purposes stated. The court below found that the technique of fund accounting to comply with grant restrictions is in use at the

colleges to comply with federal grant programs and that any audit required by the Maryland program would be "quick and non-judgmental" (App. to Jur. St. 48).

This two-step "before and after" verification procedure is essentially the type of procedure used to ensure proper use of funds received under the Higher Education Facilities Act of 1963. (See the lower Court decision in *Tilton,* i.e. *Tilton v. Finch,* 312 F. Supp. 1191, at 1202 (D. Conn. 1970). Under that Act, the college first identified the particular "facility" desired under the program in its application, and was required to provide "assurances" that "no part of the areas included in the proposed project will be used for such proscribed purposes." *Tilton v. Finch, supra,* 312 F. Supp. 1191, 1202.

Appellants contrast the Maryland aid with the "Tilton" aid:

> "The Maryland aid is paid directly to church related and other institutions of higher education A.52. Each institution determines for itself how its share will be used. R.1582-1583. There are no restrictions as to use of the aid, except use for sectarian purposes is proscribed. A.54." (Appellants' Brief, p. 30).

Each of the above so-called "contrasting" factors are actually parallel factors.

In essence, the only difference between the Maryland Act and the act upheld in *Tilton,* is that the Maryland aid is restricted to purposes verified by the College to be non-sectarian purposes, while the federal act was restricted to facilities, the purposes for which were verified by the colleges to be non-sectarian purposes.

Appellants contend that the State's enforcement will be ineffective, citing the finding of the court below that

the available audit procedure is "non-judgmental" (Appellants' Brief, p. 56). It is clear, however, that it is not the availability of the audit procedure which is the primary mechanism of enforcement. The audit procedure is just an additional mechanism which is "available when needed" as a "mechanical accounting of state grant expenditures" (App. to Jur. St. 48). The actual "judgment" as to proper usage is made by the administering body upon the verification of purpose by the college president, just as the applications for grants are reviewed under The Higher Educational Facilities Act. The function of the auditor, if needed, is to see that the money was spent for the purposes approved by the administering body.

Appellants also allege several failures by the Maryland Council for Higher Education in its review of funds expended:

> "In fact, at least one defendant (Loyola College) has already used aid for this purpose [scholarships]." (Appellants' Brief, p. 51).
>
> "By commingling aid with general college operating funds, two appellees have already used aid for building maintenance." (Appellants' Brief, p. 55).
>
> "Although the State requires recipient institutions to adopt internal accounting and administrative procedures to control the use of aid, it fails to attempt any review of the adequacy of such procedures." (Appellants' Brief, p. 56).

Appellants overlook the fact that at the time of trial, the only funds paid out to church-related institutions under the Act, were paid under the original statute (Chapter 626, Acts of 1971) *which did not require any restriction on the use of the funds by the colleges.* At the time of trial, the "restricted" funds were still in escrow. (App. to Jur. St. 37, n. 2).

After extensive testimony, the court below concluded that the State was able and prepared to enforce the restriction:

> "The procedural posture of this case has prevented the development of follow-up procedures to ensure that no state funds are converted to religious uses in later years. However, unlike the 20-year restriction held unconstitutional in *Tilton*, the prohibition on sectarian use in the statute is absolute, and the Council seems aware of its responsibilities in this matter. The Court is satisfied that adequate, non-entangling follow-up procedures will be developed. See Findings of Fact" (App. to Jur. St. 18).

Despite the conjecture and hypothetical problems raised by Appellants, the court below was satisfied that the State's procedures, and the experience of the Appellee institutions with federal program requirements, afford protection that the aid will be used for secular purposes (App. to Jur. St. 48).

The fact that the Maryland aid is not categorized as to the type of educational purpose to which it must be put is not significant. Categorization of aid has only been required by this Court when the aid involved "pervasively sectarian" schools. See *Meek v. Pittenger, supra,* 43 U.S.L.W. 4596, 4600. (See discussion pp. 21-22, *supra*). Where the institution has a predominantly educational purpose, only the negative restriction is necessary to ensure that identifiable religious activities (e.g. chapel) do not receive funds.

Because religion does not permeate the secular educational programs of Appellee colleges, the established procedures of the Maryland administering body effectively prohibit the use of funds for sectarian purposes as required by the Maryland Act.

III.

THE MARYLAND PROGRAM DOES NOT FOSTER EXCESSIVE GOVERNMENTAL OR POLITICAL ENTANGLEMENT WITH RELIGION.

The court below found that the "relationship between church and state which results from this aid program is not entangling" (App. to Jur. St. 17). The court below considered the three mitigating factors noted by this Court in *Tilton:*

> "In evaluating administrative entanglement, the Court must examine three factors: The 'character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.' *Lemon v. Kurtzman, supra,* at 615" (App. to Jur. St. 14).

The court below concluded that 1) "The aid in this program is restricted to the secular aspects of the institutions." (App. to Jur. St. 19); 2) "It has been found that religious indoctrination is not a purpose of these institutions." (App. to Jur. St. 19); 3) "The continuing nature of the program is not constitutionally fatal" (App. to Jur. St. 20).

A. Maryland Aid To The Educational Functions Of St. Joseph College May Be Administered Without Government Entanglement Because Religion Does Not Pervade Those Educational Functions.

The factual basis for this Court's holding in *Lemon v. Kurtzman, supra,* that the Pennsylvania aid program fostered excessive entanglement between government and religion, was the finding that religion and indoctrination were interwoven through the fabric of the entire educational program:

"The curriculum presents subtle and difficult problems. The constitutional mandate can in part be carried out by censoring the curricula. What is palpably a sectarian course can be marked for deletion. But the problem only starts there. Sectarian instruction, in which, of course, a State may not indulge, can take place in a course on Shakespeare or in one on mathematics. No matter what the curriculum offers, the question is, what is *taught?* We deal not with evil teachers but with zealous ones who may use any opportunity to indoctrinate a class." *Lemon v. Kurtzman, supra,* 403 U.S. 602, 634-35 (concurring opinion of Mr. Justice Douglas).

"It is well known that everything taught in most parochial schools is taught with the ultimate goal of religious education in mind." *Lemon v. Kurtzman, supra,* 403 U.S. 602, 635 (concurring opinion of Mr. Justice Douglas).

"In the present cases we deal with the totality of instruction destined to be sectarian, at least in part, if the religious character of the school is to be maintained. A school which operates to commingle religion with other instruction plainly cannot completely secularize its instruction. Parochial schools, in large measure, do not accept the assumption that secular subjects should be unrelated to religious teaching." *Lemon v. Kurtzman, supra,* 403 U.S. 602, 636-37 (concurring opinion of Mr. Justice Douglas).

In *Lemon,* this Court found that policing the restrictions upon the aid would require an entangling relationship:

"I would think that policing these grants to detect sectarian instruction would be insufferable to religious partisans and would breed division and dissension between church and state." *Lemon v. Kurtzman, supra,* 403 U.S. 602, 636 (concurring opinion of Mr. Justice Douglas).

This Court in *Lemon* also found direct and absolute control of the church over the teachers: "This problem looms large where the church controls the hiring and firing of teachers." *Lemon v. Kurtzman, supra,* 403 U.S. 602, 636 (concurring opinion of Mr. Justice Douglas).

It is clear that the basic distinction between *Tilton* and *Lemon* is that the secular educational function of the colleges in *Tilton* was not so permeated by religious indoctrination that an entangling relationship resulted from enforcement of the restrictions:

"Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education. This reduces the risk that government aid will in fact serve to support religious activities. Correspondingly, the necessity for intensive government surveillance is diminished and the resulting entanglement between government and religion lessened. Such inspection as may be necessary to ascertain that the facilities are devoted to secular education is minimal and indeed hardly more than the inspections that States impose over all private schools within the reach of the compulsory education laws." *Tilton v. Richardson, supra,* 403 U.S. 672, 687.

Again in *Hunt v. McNair, supra,* this Court stated that the entanglement of government and religion was caused by the inseparability of religion and the secular educational program:

"The Court's opinion in *Lemon* and the plurality opinion in *Tilton* are grounded on the proposition that the degree of entanglement arising from inspection of facilities as to use varies in large measure with the extent to which religion permeates the institution." 413 U.S. 734, 746.

B. The Maryland System Requiring Use Identification And Verification Is A Proven Means Of Restricting Governmental Grants To Designated Purposes Without Requiring Intensive Surveillance.

The two-step "before and after" verification procedure established is essentially the type of procedure used to ensure proper use of funds received under the Higher Education Facilities Act of 1963. (See the lower court decision in *Tilton,* i.e. *Tilton v. Finch,* 312 F. Supp. 1191, at 1202 (D. Conn. 1970), discussed at p. 38, *supra*).

Once the use made of the aid is identified by the college and approved by the administering body, an auditing procedure is available to verify that the funds are used for the purposes stated. The court below found that the technique of fund accounting to comply with grant restrictions is in use at the colleges to comply with federal grant programs[4] and that any audit required by the Maryland program would be "quick and non-judgmental" (App. to Jur. St. 48).

Appellants contend that a non-judgmental audit is of no effect. Obviously, the auditor "judges" whether the funds are spent for the purposes stated. The effective judgment is made, however, by the administering body in acting upon the use verification. Since religion does not permeate the secular education of the Appellee colleges, the judgments made do not require the sorting out of religious from secular functions which this Court has held to be entangling.

[4] Fund accounting under federal grants to colleges is presently required under numerous federal programs and St. Joseph College, as well as the others, are experienced in complying with such requirements (Tr. 312-14).

It is clear that this Court in *Tilton* permitted a "continuing relationship" between the government and colleges. The Court, in fact, required the inspection of the facility to continue beyond the twenty-year period prescribed by the statute. 403 U.S. 672, 689. This Court distinguished *Tilton* from *Lemon* because enforcement of the Higher Education Facilities Act did not require a continuous surveillance of the institution:

> "Finally, government entanglements with religion are reduced by the circumstance that, unlike the direct and continuing payments under the Pennsylvania program, and all the incidents of regulation and surveillance, the Government aid here is one-time, single-purpose construction grant." *Tilton v. Richardson, supra,* 403 U.S. 672, 688.

A continuing relationship between the State of Maryland and Appellee colleges does not, in itself, foster excessive entanglement between government and religion. The entangling relationship found by this Court in *Lemon* was the continuing governmental surveillance necessary to detect and remove from parish school programs the methods of religious inculcation which permeated those sectarian institutions. In this case, the court below found that no such detection and removal is necessary, because the secular educational programs of the colleges are not permeated by religion, and that the state can ensure use of the aid for those secular programs without establishing an entangling relationship.

In *Meek v. Pittenger, supra,* this Court considered the "potential for political entanglement" and "successive opportunities for political fragmentation and division along religious lines, one of the principal evils against

which the Establishment Clause was intended to protect." 43 U.S.L.W. 4596, 4603.

The opinion of Mr. Justice Brennan, with whom Mr. Justice Douglas and Mr. Justice Marshall joined, concurring and dissenting, set forth their fears of "political entanglement":

> "In a community where . . . a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity. Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all the usual political techniques to prevail. Candidates will be forced to declare and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith. [Citing *Lemon v. Kurtzman, supra,* 403 U.S. 602, 622-23]." 43 U.S.L.W. 4596, 4604.

It is clear that the fears expressed above are not applicable to this case. Of the remaining four Appellants, one college has closed, and thus Appellants constitute only three of seventeen institutions receiving aid under the Act (App. to Jur. St. 35-36). In addition, the Appellee colleges are not parish schools with partisans dedicated to both the religious and secular educational missions of their schools. The history of the Maryland Act shows that the primary issue was the need to assist private colleges and thus save money for the state.

The Maryland District Court of three Judges correctly held that the Maryland aid program does not foster excessive governmental entanglement with religion.

IV.

IF THE MARYLAND AID PROGRAM IS IN VIOLATION OF THE ESTABLISHMENT CLAUSE, ST. JOSEPH COLLEGE SHOULD NOT BE REQUIRED TO PAY BACK FUNDS ALREADY RECEIVED IN RELIANCE UPON THE CONSTITUTIONALITY OF THE MARYLAND ACT.

Appellants' prayer that monies paid out be repaid to the State by the Appellee colleges arises only if the Act is held to violate the Constitution. The question then arises as to whether this Court's ruling should be applied retroactively. The court below held that the original Act (Chapter 626, Acts of 1971) violated the Establishment Clause, but held that the principles established by this Court in *Lemon v. Kurtzman,* 411 U.S. 192 (1973) *(Lemon II)* compelled a holding that the funds awarded and paid under the original Act not be repaid (App. to Jur. St. 23-23). The dissenting opinion concurred in the result (App. to Jur. St. 34). On this issue, Appellee adopts the reasoning and authority of the Maryland District Court of three judges in support of that holding.[5]

The issue of whether subsequent funds awarded and paid under the Act as amended must be repaid only arises if this Court reverses the holding of the Maryland District Court of three judges, that the Act, as amended, is constitutional. In such a case, the principles of *Lemon II* would require that such a holding not be applied retroactively.

It is submitted that the following language, quoted from *Lemon II,* is compelling in the instant case:

---

[5] Apparently Appellants do not contest this holding. Appellants' Brief submits that "all payments not enjoined upon timely filed motions or applications" should be repaid (Appellants' Brief, p. 76). However, the grants under the original Act were awarded and paid before this litigation was initiated (App. to Jur. St. 37, n. 2; App. 2).

> "Appellants ask, in effect, that we hold those charged with executing state legislative directives to the peril of having their arrangements unraveled if they act before there has been an authoritative judicial determination that the governing legislation is constitutional. Appellants would have state officials stay their hands until newly enacted state programs are 'ratified' by the federal courts, or risk draconian, retrospective decrees should the legislation fall. In our view, appellants' position could seriously undermine the initiative of state legislatures and executive officials alike." 411 U.S. 192, 207-08.

St. Joseph College has relied upon the official acts of the Maryland legislature, the Governor of Maryland, the Board of Public Works of Maryland, the Maryland Council of Higher Education, a United States District Court of three judges, and the United States Supreme Court, which refused to enjoin the payment of funds under the Act. If a private institution cannot rely upon the legislative and executive branches of a sovereign state, and rulings by a three-judge panel and the nation's highest Court, then where shall reliance ever be found? The conclusion of this Court in *Lemon II* is applicable to this case:

> "On this record the District Court could reasonably find reliance on the part of the appellee schools and reasonably could conclude that no more was needed to demonstrate retrospectively the degree of their reliance." 411 U.S. 192, 206.

This Court in *Lemon II* considered whether any ruling of unconstitutionality by this Court should have been so clearly foreshadowed that the State could be considered to have acted in bad faith in paying out funds to the colleges pending appeal. 411 U.S. 192, 206-07.

Clearly there is no reason for the State to have anticipated such a ruling, when it paid out funds. A United States District Court of three judges found the Maryland Act, as amended, to be constitutional under established decisions of this Court. The recipient colleges closely parallel the colleges in *Tilton*. This Court has not heretofore found excessive government entanglement with religion to exist in aid programs to church-related colleges whose educational programs are not pervaded by religion. The concept of political entanglement has been set forth by this Court only in general terms as a supportive ground for its decisions based on more established and specific constitutional tests. *Meek v. Pittenger, supra,* 43 U.S.L.W. 4596, 4602. A ruling by this Court that the Maryland program is unconstitutional requires a departure from the established line of decisions, or a novel approach to the issue.

In *Lemon II,* this Court considered whether the constitutional evils associated with the program would be furthered if repayment were not required. 411 U.S. 192, 201-03.

If this Court finds the Act unconstitutional because of administrative or political entanglement, the repayment of funds will not further the constitutional objectives of such a holding. Any entanglement with respect to the funds paid will not be "untangled" as a result of repayment. In fact, additional administrative and political entanglement may result from the State collecting the funds from these private institutions.

Appellants' claim that a failure to require repayment would deprive them of any effective remedy (Appellants' Brief, p. 79-80). On the contrary, Appellants have had access to every course of redress available to

taxpayers and citizens, including access of citizens to their elected representatives and the opportunity to present a convincing case, based on the evidence, to a federal District Court of three judges. That the Appellants have failed in these endeavors thus far, is a risk inherent in the processes of the judicial system, and should not be "remedied" by subjecting the Appellee colleges, which have relied upon the same judicial system, to a "draconian, retrospective decree."

It is submitted that Appellants' prayer to require repayment of the funds disbursed under the Maryland Act be denied.

CONCLUSION

The court below correctly applied the constitutional principles and specific criteria established by this Court and determined that the Maryland aid program does not have the primary effect of advancing religion and does not foster excessive entanglement between government and religion. Although Appellants insist that the court below erred in its factual findings that the secular educational programs of Appellee institutions are not permeated by religion, and that the Maryland statute does, in fact, restrict the aid from use for sectarian purposes, such insistence by Appellants is not supported by the evidence documented in the record before this Court. The judgment of the Maryland District Court of three judges should be affirmed.

Respectfully submitted,

GEORGE T. TYLER,
ROBERT V. BARTON, JR.,
1600 Maryland Nat'l Bank Bldg.,
Baltimore, Maryland 21202,
Attorneys for Appellee,
Saint Joseph College.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-730

JOHN C. ROEMER, III, EDWARD E. DOERR,
KENNETH A. STEVENS, AND
CYNTHIA KOONCE MILLER,

Appellants,

v.

BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND; MARVIN MANDEL, GOVERNOR; LOUIS L. GOLDSTEIN, COMPTROLLER; JOHN A. LUETKEMEYER, TREASURER; COLLEGE OF NOTRE DAME OF MARYLAND, INC.; MOUNT SAINT MARY'S COLLEGE; SAINT JOSEPH COLLEGE AT EMMITSBURG, MARYLAND, INC.; AND THE ASSOCIATED PROFESSORS OF LOYOLA COLLEGE IN THE CITY OF BALTIMORE, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
for the DISTRICT OF MARYLAND

BRIEF FOR THE COLLEGE OF NOTRE DAME OF MARYLAND, INC.

GEORGE W. CONSTABLE,
Attorney for the College of
Notre Dame of Maryland, Inc.,
1000 Maryland Trust Building,
Baltimore, Maryland 21202.

The Daily Record Co., Baltimore, Md. 21202

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT for the DISTRICT OF MARYLAND

BRIEF FOR THE COLLEGE OF NOTRE DAME OF MARYLAND, INC.

OPINION, JURISDICTION & CONSTITUTIONAL AND STATUTORY PROVISIONS

This Appellee Defendant accepts the Appellants statements concerning the opinion below, the jurisdictional grounds, and the constitutional and statutory provisions involved.

QUESTIONS PRESENTED

1. Does the Maryland College aid program have a primary effect of advancing or inhibiting religion in violation of the First Amendment?

2. Does the Maryland College aid program entail excessive governmental entanglement with religion in violation of the First Amendment?

3. If the Maryland College aid program is held unconstitutional, should the Appellee colleges be required to repay the funds which were paid to them without Court restraint during a period when the program had been declared constitutional?

STATEMENT OF THE CASE

To avoid unnecessary repetition, this Appellant adopts the following portions of the "*Statement of the Case*", viz. "*A. The Challenged Statute.*" "*B. The Proceedings Below,*" and "*C. The Decision Below,*" set forth in the Brief of Appellees Loyola College and Mount Saint Mary's College (pp. 3-12).

However, the relevant particulars as to this Appellee, the College of Notre Dame of Maryland, Inc., require special statement. The Appellants have exhaustively combed over all operations of the Appellee colleges, selected every possible religious aspect, massed these up out of context, and sought to give the impression of old-fashioned sectarian institutions devoted to promoting Catholicism.

Such an impression is totally false. Whatever the historical reasons for the not-uncommon assumption that an educational institution sponsored and partly staffed by Sisters and serving students who are mostly Catholics is *per se* sectarian, the assumption is no longer justified as applied to this liberal arts college.

To make this clear it is important to outline both what Notre Dame *is not* and what it *is*.

We will describe the negative aspects first in order to develop the contours of the picture before filling in the content:—

What Notre Dame is Not.

(a) The often and clearly stated purpose of the College is, not to teach or propagate Catholicism or religion, but to give a liberal arts education to women. See Charter (NDX 1); By Laws NDX 58; Tr. 425-6, 464. Catalogues esp. 1971-1972, page 9, NDX 56-57.

(b) The College is not financed by the Church Tr. 463.

(c) The church hierarchy has no power to control the educational program of the college, and does not attempt to exercise any control Tr. 464.

(d) Religion does not influence the formation of the curriculum, the selection of textbooks, or the mode of teaching courses, except in so far as the Religious Studies Department is necessarily dealing with religion. In no course, including theology, is there any indoctrination or proselytizing with respect to any religion. All courses are taught as academic disciplines and there is no attempt to indoctrinate or proselytize. There is no interference with academic freedom of the faculty Tr. 459, 557, 566, 601, 458, 507-8. See NDX 586 (book list). Fr. Satterfields deposition, NDX 71 C, p. 38.

(e) Students are not recruited or selected on a religious basis Tr. 433. It is not true to say there is a *de facto* restriction on admissions. All faiths are welcomed. The applicant's religion is not even asked. If certain Catholic sources of student applications are tapped, that is in order to fill the roster from sources

which have in the past provided qualified applicants, not to establish a predominant group Tr. 433-35.

(f) Student aid is not granted or withheld on the basis of religious affiliation. Sisters, parochial school teachers, and Continuing Education students who enroll, if otherwise qualified academically, are given discounts because of their limited financial means Tr. 436-8. Obviously the latter two groups are not necessarily Catholics — any person regardless of religion could belong to either category.

(g) The granting of degrees has no relation to religion or religious beliefs or religious habits of the student Tr. 461.

(h) Students are not required to conduct themselves in accordance with any specific church rules, nor are they disciplined on the basis of breaking any such rules, as distinct from general moral rules of the Western Judeo-Christian heritage common to most colleges. See Tr. 493, Tr. 431, 504-5.

(i) Students are not required to attend any religious services or religious retreats Tr. 430.

(j) Neither the students nor the faculty are required to say prayers in classes and both are free to do as they see fit Tr. 460.

(k) The faculty is not selected on a religious basis except theoretically if a vacancy is involved in the Theology Department for teaching a theology course dealing with Catholicism, in which case the person having the best academic qualifications in this area would probably be a Catholic. Preference may occasionally be given to an academically qualified Sister to fill a vacancy, but this is for manpower and economic reasons, not religious reasons Tr. 569, 598, 544, 488-50, 532, 600, (Testimony of heads of departments.)

(l) The faculty, including Sisters, may wear any garb they choose; no religious garb is required Tr. 447-8.

(m) Theology courses are not limited to courses about the Roman Catholic religion (See Catalogue), Tr. 534.

What Notre Dame Is.

Notre Dame is an accredited liberal arts college for women which grants only the degree of Bachelor of Arts Tr. 460-1. Catalogues Tr. 425-6. Charter. It is a non-stock, non-profit corporation Tr. 420.

It was founded and is sponsored by the School Sisters of Notre Dame, a religious congregation of the Roman Catholic Church Tr. 424-5.

It is supported by tuition payments, gifts, and endowment income, and by services contributed by the Sisters Tr. 463.

The faculty consists of approximately 72 members of whom less than half are School Sisters Tr. 469. The faculty is selected according to academic competence and without regard to religion Tr. 544, 448-50, 532, 600, 607, 622-23, 625, 569, 598.

The college subscribes to the Principles of academic freedom of the A.A.U.P. Tr. 458-9. NDX 2. There is no evidence whatever that the College has ever intruded on the academic freedom of any member of the faculty. See Courts findings, pp. 3, 5.

The student body is selected without regard to religion and there is no attempt to find out an applicants religion Tr. 33, 575, 434, 575-76-77. Students of all faiths or no faiths are welcome if they are otherwise qualified. The reason for the predominance of Catholics in the student body is basically historical and related to the sources from which applicants naturally flow Tr. 434, See 518, 575.

Student discipline resembles that of other colleges. There are no disciplinary rules of a strictly Christian or Catholic character Tr. 431, 504-5, 537-9.

There is a chapel and a chaplain and for the convenience of the many Catholics there is daily mass in the Chapel. No student is required to attend any religious services Tr. 430, 475, 590.

The academic program consists of approximately 287 courses offered through 16 departments, each headed by a chairman. The Departments are: Art, Biological Sciences, Chemistry, Classical Languages and Literature, Drama, Economics, and Political Science, Education, English, History, Mathematics, Modern Foreign Languages, Music, Philosophy, Physical Education, Physics, Psychology, Religious Studies, Sociology.

Of the 287 courses, there are approximately 7 offered in the Theology Department.

A Student is required to take 32 courses and three January Terms equivalent altogether to 35 courses, at four credits each, which comes to a required total of 140 credits Tr. 452, Catalogue. The Faculty Curriculum Committee about two years ago instituted a core curriculum which consisted of ten courses which the student has to take sometime during the four years. These ten courses are as follows:

English	2 courses
Foreign Language	1 course
Natural Science	1 course
Philosphy	2 courses
Religious Studies	2 courses
Social Science	1 course
An interdisciplinary seminar for Freshman	1 course

The philosophy behind the core curriculum is that students should be given various approaches to knowledge, i.e., language, science, philosophy, theology, social studies, English, Tr. 452. The curriculum, which leads to a B.A. degree, "attempts to acquaint each student with the key areas of learning and to provide in-depth study a wide elective choice and some non-traditional education experience." The curriculum is comprised of three parts: The general (or core curriculum) requirements, the concentration requirements and electives. (Catalogues)

The student is required to concentrate for a major in one or more of the departmental fields of her choice, although other majors may be structured such as premedical in the chemistry and biology departments. The student usually takes about ten courses in her major Tr. 454-456.

Through a cooperative academic program with Loyola College, students may also major in Speech Pathology, Business Administration, German and Russian. Any elective course on Loyola's campus is open to Notre Dame students and any elective course on the Notre Dame campus is open to Loyola students. There has been an extensive cross-taking of courses by Loyola students in Notre Dame, and visa versa Tr. 426-7, 454.

To graduate, a student must successfuly complete the general education and concentration requirements of elective courses that total 35 Tr. 452. Students may major in areas that the College does not have a major in by taking courses at Loyola Tr. 454.

The College offers only the Bachelor of Arts degrees, so that there is no degree in Theology Tr. 461. There is

no religious consideration involved in the granting of a degree to a girl who is graduating. The degree requirements are all academic Tr. 461.

Thus the curriculum is typical of a liberal arts college in its contents, mode of teaching, textbooks, etc. There is no attempt to indoctrinate, slant, or to distort in order to proprogate any Catholic or other religious views.

There is no policy regarding the saying of prayers in classrooms, this being a matter of the teacher's choice and in no case are the students required to join Tr. 460. It is impossible to tell exactly the percentage of classes in which there are prayers because no records are kept in classes where prayer may sometimes be said; it is only rarely Tr. 507-8.

The Religious Study Department, headed by Rev. Carroll Satterfield and comprising four other teachers, (one Priest, two Sisters, and one layman) (Tr. 532-3) offers 7 or 8 courses, (Tr. 533).

The courses are not limited to specifically Catholic theology. The religious studies courses are taught as an academic discipline and as an aspect of the human experience. As with other courses, there is no attempt to indoctrinate or proselytize. Again, there is no attempt to slant, distort, suppress or otherwise persuade to a particular point of view. (Satterfield deposition, NDX 71 C, p. 38, 36-37, 39-40).

The College has the religious studies in the core curriculum because it feels that the liberal arts college would investigate the various areas of the human experience and among these, for instance, are the scientific area, the linguistic, or language area and so on, and the area of ultimates, philosophy, and the religious experience as an experience that comes up in

the human experience, Satterfield deposition, p. 45, 36 (NDX 71 C).

In addition to the regular scholastic curriculum, the College is involved in various community service programs, dealing for example with drama, economics, political science, performing arts and lectures Tr. 441-446.

There is also a Continuing Education Program aimed at adult women who want to return to formal education and possibly obtain a degree Tr. 438-9. There is no inquiry into the applicants religious preferences.

There are some crucifixes, statues and other religious symbols, in a number of buildings and classrooms Tr. 478. The decor of a domitory room is up to the students Tr. 465.

Thus in summary, the Appellee, the College of Notre Dame of Maryland, Inc., is fairly typical of a 4 year liberal arts college for women: — that is to say, it is an institution which offers some 287 courses (of which only 7 or so are in theology), through 16 basic departments of learning (only one of which is religious studies); — it has a standard system of a core curriculum, elective majors and credits; — a program for continuous adult education; — community service programs, including lecture series, performing arts activities, volunteer services, and other community services. It is in no sense a religious or sectarian institution.

SUMMARY OF ARGUMENT

I.

The critical practical point before the Court for decision is whether or not the case of *Tilton v. Richardson,* 403 U.S. 672 (1971) requires a finding for the Appellee colleges.

This resolves itself into two questions:

(a) on the one hand whether the Appellee colleges are significantly different from the *Tilton* case colleges, and

(b) on the other hand whether the nature of the public program of aid is significantly different so as to call for a different result than in the *Tilton* case.

As to (a) the evidence is overwhelming that the colleges are almost identical with the *Tilton* case colleges; any differences being minor and in some cases more favorable to the Appellee colleges.

As to (b) there is no constitutionally significant difference between (1) a single program of grants whereunder a college can obtain funds to erect a building of more or less any type it wants so long as it is non-sectarian, and (2) a program of annual grants whereunder the college can obtain funds for such secular use as it elects so long as the use is non-sectarian. In neither case is there a primary effect of enhancing religion. And in neither case is there excessive government entanglement. It is no more difficult, or judgmental, or divisive, or entangling, to ensure that a building is not used from year to year for religious purposes than it is to ensure that an annual grant for non-sectarian purposes is not used for religious purposes. The problem of what happens in a building is ongoing. Moreover, the *Tilton* case could hardly mean that annual construction grants were not permissible, and that a program is only constitutionally valid if for one year.

II.

The Court should not apply to the Appellee colleges standards regarding permissible or impermissible religious features which it is not prepared to apply to all liberal arts colleges and universities. It is well known that most private liberal arts colleges have chapels, chaplains and religious services, together with departments of religious studies and the teachers therefor. Many of them have religious symbols very much in evidence.

If the Court is not prepared to say that general grants paid to Harvard or the University of Virginia or Princeton, or the like, where these features are present, are unconstitutional, because the funds might indirectly subsidize the religious activities, or the teachers, or the buildings where prayers might be said, it should not do so with the Appellee colleges.

There is a balanced perspective necessary in First Amendment cases, and the need to treat equals equally, free of historically based prejudices.

III.

If the Grants are held unconstitutional repayment should not be required. The colleges were all hard pressed financially and timely payment is of the essence. It would be a greater hardship and injustice to have much needed funds held up during years of litigation in the event the grants are ultimately declared constitutional, than to permit the colleges to retain the money if the grants are ultimately declared unconstitutional. The damage to the college would be enormous, whereas the damage to the taxpayers would be minimal, and indeed in the instant case, nonexistent. For the potential danger of misuse of funds for religious funds in fact did not occur and will not occur, because

the colleges have been most careful to allocate the funds to items that are indisputably secular.

The funds were not paid out to the colleges nor spent by the colleges unreasonably, for both the State and the colleges were reassured by the *Tilton* decision and by the decision of the District Court before the payment was made. Furthermore the payment was not made until after both the Federal Court and the Supreme Court were requested to enjoin it and refused to do so.

The colleges have, detrimentally to themselves, relied upon the payments to meet their budgeted needs. They have no way of recouping the funds spent for goods and services.

ARGUMENT

I.

THE PRINCIPLES, AND THE APPLICATION THEREOF, IN *TILTON v. RICHARDSON* REQUIRE A FINDING FOR THE APPELLEES

All parties appear to agree that the underlying tests of constitutional validity at issue in this case are the requirement of no primary effect to enhance religion and the requirement of no excessive government entanglement.

The general law, the historical background and the cases are fully developed in the Briefs submitted on behalf of Loyola College and Mount St. Mary's College and on behalf of Saint Josephs College. The Appellee identifies itself with the positions and arguments therein presented. Rather than simply repeat them, this Appellee will attempt to focus on what seems to it to be the ultimate practical issue before the Court for decision.

Striped of all background analyses, this issue is whether or not the case of *Tilton vs. Richardson,* 403, *U.S.*672 (1971), requires a finding favorable to the Appellee colleges. The District Court as well as all parties either directly or indirectly acknowledge the centrality of the *Tilton* case. Church-related liberal arts colleges were involved; the primary effect and the excessive entanglement requirements were at issue; the decisions was favorable to the colleges; and the case is recent.

This issue resolves itself into two questions, both bearing on the application of the primary effect test and of the excessive entanglement test:

(a) Are the Appellee colleges significantly different from the *Tilton* case colleges; and

(b) Is the nature of the program of aid significantly different so as to call for a different result.

A.

The Appellee colleges do not significantly differ from the colleges in the Tilton case.

To do justice to this point, it is necessary not only to read the opinion of the Court in the *Tilton* case, but to go behind the opinion to the supporting record since the Opinion singled out for special mention only part of the features of the colleges.

From both sources, it appears indisputable that, like the Appellee colleges, the *Tilton* colleges were liberal arts colleges sponsored by Catholic organizations; that the student body was primarily Catholic, although there were no religious restrictions on admission; that the faculties were predominantly Catholic; that the colleges gave rounded academic programs and curriculums which were taught in an academic way without

indoctrination; that there was a policy of academic freedom; that the colleges had chapels, chaplains, and religious services, but there was no required attendance at any religious activities; that they had departments of theology, and students were required to take courses in theology; that there were religious symbols and dress in evidence; that there were prayers in classrooms said on a voluntary basis; that there was no compulsion of obedience to any doctrine or dogmas of the faith.

The distinctions suggested by Appellant (p. 21) are that the Appellees had a policy or practice of favoring members of the sponsoring religion for certain faculty appointments; that recruiting practices limited entry to Catholic students; that daily opportunities for worship were limited to Roman Catholics; and that the method of teaching theology in the Appellee college was either admittedly for religious purposes or could be potentially taught in a religious manner.

The aforegoing points are simply not upheld by the record.

In the first place there is no showing that the *Tilton* case differed as to faculty appointments or that the occasional Appellee practice of selecting a sister amounted to anything more than a matter of saving money in a tight financial situation or of having the most fit teacher for the particular subject.

As to recruiting, it is grossly unfair to suggest that entry is limited in a large measure to Catholic students. Girls of all backgrounds are welcome and in fact sought after. The predominance of Catholics is a result of history, family tradition, and recruiting students from where the College could get them in a very competitive market.

As to opportunities to worship, the Appellant overlooks the fact that in the *Tilton* colleges, the opportunities for worship were limited to Roman Catholic services. The essential point in the Court's mind, true of the *Tilton* as well as the Appellee colleges, was that attendance at services was purely voluntary.

Finally, as to a supposed difference between the methods of teaching theology, the record does not show any difference. It is true that it was stipulated in Tilton that theology was taught in an academic manner; but it is equally true that the records show that the College of Notre Dame of Maryland, Inc. actually teaches theology in an academic manner free of any indoctrinating or proselytizing approach.

The record in the instant represents an exhaustive presentation of all the facts regarding each college, amassed in the greatest detail and under the sharpest probing by the Appellants. The Judge who heard the presentation found that the Appellee colleges were truly academically free, non-indoctrinating, liberal arts colleges. And he found no significant difference between them and the *Tilton* colleges.

Since the two sets of colleges, *Tilton* and the Appellees, are so much alike, it becomes unnecessary to discuss the tests of primary effect and excessive entanglement insofar as the nature of the college is concerned.

B.

The nature of the program of aid does not significantly differ from that in the Tilton case insofar as the Fourteenth Amendment is concerned.

In both the *Tilton* program and the instant program there was a prohibition against use of the funds for

sectarian religious purposes. The only difference between the programs is that in the *Tilton* program there were single grants to colleges for building facilities of the type the college chose; whereas in the instant case, the program contemplates annual grants for any purpose chosen by the college, whether buildings or something else. Under the Maryland program an elaborate screening mechanism has been established to determine who shall receive the grants and to ensure that the grants are properly used.

The Appellant suggests that a "one-time grant" is less dangerous and more controllable than a series of annual grants. They further suggest that a "construction grant" is less dangerous and more controllable than a "general purpose" grant. Each of these distinctions bears on the application of each of the tests of primary effect and excessive entanglement; and they will be discussed under both headings.

Primary Effect

The Appellants argue that the *primary effect* of the State "general purpose" grants is to advance religion in that (a) the aid program failed to guarantee that the funds would not advance religion in respect to use for teachers salaries, scholarships and maintenance of buildings; (b) the funds would support classes where prayers were sometime said, albeit voluntarily; (c) the funds were in support of institutions with alleged religious restrictions on faculty appointments (not true) and on student admissions (not true); and (d) the funds would support institutions which have a few compulsory theology courses and which provide some religious opportunities and services on a voluntary basis.

The District Court fully dealt with the problem in the light of the principles laid down by the Supreme Court

and in the light of the guiding applications thereof by the Supreme Court in the leading cases. The Supreme Court in *Hunt v. McNair*, 413 U.S. 734 (1973) has distinguished two applications of the "primary effect" rule:

> 1. There can be no aid to an institution which is essentially sectarian. It is clear from the Findings of Fact and the Opinion (including the dissent) that this is inapplicable to the Appellee institutions in this case; they are liberal arts colleges as in *Tilton*, and not sectarian institutions.
>
> 2. There can be no aid which funds a specifically religious activity in an otherwise substantially secular setting.

It is chiefly this last principle which Appellants charge to be violated in this case. The answer to Appellants charge is that: (a) the Appellee institutions are essentially secular; (b) that any sectarian activities are clearly separable from the secular activity; (c) that the State aid statute specifically forbids use of the funds for sectarian purposes; and (d) that the administrative agency is adequate to screen institutions and to verify and enforce this required secular use. Therefore the aid cannot have the primary effect charged, if properly administered.

In short, both the spirit and letter of the Supreme Court's tests have been complied with. If the funds are, or will be, used exclusively for non-sectarian purposes, as they must be under the law, it can hardly be said that they are, or will be, used to advance religion in any of the senses charged by the Appellants.

As far as primary effect is concerned, there is no logical difference between a grant for specific secularly-used buildings (as in *Tilton*) and a grant for a range of possible secular purposes. A secular purpose is a secular purpose in either case. The only essential point is that

the grant be earmarked and used for secular purposes. There is nothing in the cases, or law or in logic, that makes it essential that the particular, specific earmarking of the fund within the ambit of all possible secular uses be fixed at the legislative level. In fact, it would seem highly desirable to permit aided colleges to have flexibility of use within the constitutionally permissible range of secular uses, as long as there is adequate regulatory provision for accurate and relatively simple checking out proper use.

The only question as far as primary effect is concerned, is whether or not the State can ensure a clear and an easily checked earmarking of the funds for secular use. Counsel for an Amicus Curiae raises a specter of the supposed impossibility of segregating the secular from the sectarian use of funds under a general grant; suggesting that there would be an inevitable mingling of uses in such matters as the cost of grounds keeping, clearing snow, utilities, air conditioning, or in the use of typewriters, telephones, computers and school supplies. We submit that this can be done and has been done with the greatest ease. For perhaps 95% or more of the college's operations have nothing whatever to do with religion and therefore it is quite easy to specifically allocate the funds to these activities which are indisputably and separably secular, whether this is for constructing a building, buying equipment, purchasing books, improving athletic facilities, or any one of hundreds of indisputably secular activities. The limiting of the grant to buildings as against other secular purposes does not make the secular application any more certain. Who is to say, for example, that a so called music building, a dormitory, or an arts and drama building, will never have prayers said in them or religious services held in

them or theology taught in them. Yet the Supreme Court was willing to uphold a program where the secularity of the use was essentially established by classification of the type of building. If buildings can be classified, so can supplies and services.

Counsel's argument prove too much. For it would invalidate general public grants to universities, like Harvard or Yale, which have chapels, chaplains, religious studies, and even Divinity Schools.

We submit that it is relatively simple to establish a system to ensure a secular use of the funds so that there can be no primary effect to aid religion. In the last resort, the Appellants case must therefore come down to this, whether such a system would involve an excessive government entanglement with religion.

Entanglement

The Appellants suggest that the kind of verification required in the use of a general grant would involve the kind of "leaning-over-the-shoulder" monitoring feared in the case of grants to parochial schools. This is obviously not true. Parochial schools have a clear sectarian purpose unlike the Appellee colleges, and in such schools there is a potential in the manner of teaching which could involve use of the funds to support religion.

Appellants further say that the situation is unlike that in the *Tilton* case because

(a) The grants are not for "religiously neutral facilities" and (b) the grants are not one time, single purpose grants but involve on-going annual grants which would require continuous governmental audits and judgmental monitoring of the institutions.

These points were fully and directly dealt with by the District Court.

As to (a) it was pointed out that the distinction between *Tilton* and this case was more apparent than real. The difference between "construction grants" for buildings intended for secular use and grants which are "non-categorical" as to type of secular use but which are restricted by a general, all-encompassing legal prohibition against use for *any* sectarian purpose whatever is a distinction which "does not rise to constitutional dimensions" (A-17 of Opinion in Appellants' Jurisdictional Statement). After all, it is not verifying the type of building, but *verifying what happens in the building over the years*, that gives rise to the possibility of entanglement. As the District Court said "The classroom building provided in *Tilton* and *Hunt* are no more neutral in the abstract than the classroom buildings which were maintained with public funds in *Nyquist*" (A-15).

The Appellants are attempting to convert the Supreme Court's observations in the *Tilton* case to the effect that payments for "ideologically neutral" buildings "reduced" the danger of entanglement (p. 686) into a formal Supreme Court requirement for constitutional validity of a grant.

As to (b), i.e., the danger arising out of on-going financial entanglement because the aid is not in the form of a single grant, again the District Court fully considered this and found that the continuing nature of the grants was not constitutionally fatal. For, after all, even in *Tilton*, where one time construction grants were permissible, there would obviously be

> "required a continuing and perpetual involvement of the government with the schools to ensure that publicly financed buildings would never be used for sectarian purposes" (J.S. pp. A-20).

Further, as the District Court noted, in *Hunt v. McNair*, 413 U.S. 734 (1973)

> "The Supreme Court found the South Carolina Statute to be constitutional even though it established a school governmental relationship which was far more intimate and pervasive than any relationship likely to result from the statute now under consideration" (J.S.-A.-20-21).

And of course, many constitutionally permissible forms of state aid are on-going, annual programs involving continuing financial relationships — viz, aid for school textbooks, school lunches, school health programs, school buses, etc.

Further, to elevate the "on-going" feature of the grants, into a constitutionally fatal factor, would be in effect to say that a State could not give *annual* construction grants. Surely the Court would not have proscribed grants by the State of Connecticut to the *Tilton* colleges simply because the State made available to each college a new grant in another year. We submit that the annual nature of grants can hardly in itself be a basis of unconstitutionality.

In summary, neither the absence of a limitation of a grant for a single supposedly "neutral" building nor the presence of an on-going program are significant points under the existing tests and the applications thereof, developed by the Supreme Court.

The District Court arrived at its decision by applying these tests and the related factors laid down by the Supreme Court, to the facts — including the facts that the institutions were at college rather than high school or elementary school level; that the institutions were non-sectarian liberal arts colleges; that the law provided a flat and all embracing prohibition against any

use of the funds for sectarian purposes; and that the program was administered by a state agency capable of establishing adequate relations and procedures to ensure such required use of the funds without undue surveillance.

II.

THE EQUAL APPLICATION OF THE FOURTEENTH AMENDMENT REQUIRES A FINDING FAVORABLE TO THE APPELLEE COLLEGES.

The Court should not apply to the Appellee colleges standards regarding impermissible religious features which it is not prepared to require to be applied to all other liberal arts institutions, whether Harvard, University of Virginia, Yale, Brandeis, the University of Maryland, or any others. Yet that is what the Appellants, in singling out the Appellees, are asking the Court to do, probably inspired by a feeling that Catholic sponsored education is especially prone to a missionary tendency.

Whatever may have been the religious orientation of Catholic sponsored educational institutions in the past, the day has long since gone when this Appellee liberal arts college had any such missionary role. Just as Harvard, Princeton and Yale originally had a strong Christian background and purpose, but gradually became secularized, so, as the evidence in this case makes transparently clear, the Appellee colleges have similarly become secularized. What remains of religion in the latter group, remains in the former, and is permissible.

Thus it is common knowledge, and in evidence in this case, that many if not most other liberal arts colleges, particularly but not exclusive the private ones, have:

(a) chapels, chaplains, and religious services,

(b) departments of religious studies or theology, with the attendant courses and teachers.

It is considered part of a rounded liberal arts education to make these features available.

If these features, separately or together, are not to be constitutionally fatal in the innumerable federal and state programs of government aid — a result which would have an enormous and adverse impact on education — neither should they be fatal to the Appellee colleges.

The Appellants may reply that besides these common features, in the Appellee colleges voluntary prayers will be said in buildings that would benefit from the aid; that there are more religious symbols in evidence; and that the Appellee institutions have a large proportion of students, faculty and trustees with a given religious affiliation which proves a *de facto* religious restriction.

As to the first two points: unless the Court is prepared to say that a program of possible aid must provide guarantees that the aid will not be used for any buildings in any institution in the country in which prayers might be voluntarily said by students or teachers or others, or that the aid must not benefit an institution where religious symbols and dress may be in evidence, it should not impose such requirements upon the Appellee colleges.

As to the religious affiliation of portions of the faculty, the student body and the governing body — in the first place it is absolutely false to say that if there is any requirement for a religious quota, or any attempt to impose a religious quota, on the faculty or student body at the Appellee college. But regardless of this, such affiliation has been held irrelevant to the issue in the

Tilton case; and it is indeed irrelevant both in logic and in the concrete operation of the Appellee college. The important thing is not the religious affiliation of the persons who attend or run the college, but *what the college does*. In this case, the Appellee does what other liberal arts colleges do: — it gives a broad liberal arts education without any intent or practice of instilling religion but with the intent of making available to students, in a free, non-indoctrinating, academic way, various options in human experience and knowledge, including among others, the religious field, just as other colleges not deemed vulnerable, such as Harvard, do.

III.

IF THE GRANTS ARE HELD UNCONSTITUTIONAL, REPAYMENT SHOULD NOT BE REQUIRED.

As is pointed out in the case of *Lemon v. Kurtzman*, 411 U.S. 692 (1973) there are equitable principles involved.

We submit that these principles do not favor repayment. Under the circumstances of financial stress and of imminent need of the colleges for funds, it would be more harmful and unjust to hold up payment for years while the constitutionality is being determined than to permit the payment to be made and the funds to be expended. For if the final result is that the grants are constitutional, a permanent damage may have been done to the college that could not get its funds when it needed them. Timely payment is of the essence with respect to those in dire need. On the other hand, if the ultimate finding is that the grants are unconstitutional, the damage to the individual taxpayer would not be as serious, and in fact, in this case, there would not be any damage at all. For the potential evils of aiding religion, which would be the only reason for unconstitutionality, *have not in fact* occurred at the Appellee college as a

result of the grants. Appellants have not shown, and could not show, that the funds were used to aid religion. At most it could be shown that the State funds went into the general operating account of Appellee and were earmarked and are being used for purposes which are clearly secular, beyond any controversy. This use does not even have the theoretical vulnerability that general grants to all the colleges and universities not under attack would have where a minute fraction of the unsegregated money could be deemed to be used to defray salaries of theology teachers, or lecturers or utilities for chapels, and the like. If such grants say to Harvard or Yale which have religious studies and chapels do not constitute an unconstitutional injury to the taxpayer, neither should it in the instant case.

This balancing of equities in favor of the Appellee colleges would not be as compelling if the State and the colleges had thrown caution to the winds and gone blindly ahead in the face of a probability of an adverse decision. But they did not do so. On the contrary that had, to reassure them at the very beginning, the decision in the *Tilton* case, which on its face certainly seem to justify the grants. On top of this, they waited for almost three years until the District Court, after a most exhaustive inquiry to the facts and consideration of the law, found that the grants were constitutional and that reliance on the *Tilton* case had been justified. Moreover, they did not receive the funds until after both the District Court and the Supreme Court refused the application of the Appellants to enjoin payment of the grants.

If the payment was allowed in *Lemon II* upon the general principle of the School's detrimental action in reliance upon the Pennsylvania Aid Program it would seem even more equitable to allow it in the instant case.

For in *Lemon II* the action in reliance was taken (a) before receipt of the payment, (b) in the face of an almost certain challenge of the validity of the program, and (c) in an untested and uncertain area of legality; and the Supreme Court still allowed the payment after the program was declared invalid. In the instant case the action in reliance was (a) not only before the payment (in the form of budgeting) but also *after* the payment (in the form of immediate and unrecoupable expenditure of the entire sum to meet the budget); (b) without any forewarning of the probability of a legal challenge; and (c) with the encouragement given by the *Tilton* decision which could be reasonably interpreted as an indication of the probable validity of the Maryland Program.

What would have been done by the College in the way of lessened expenditures or other adjustments if the grant had not been received cannot now be determined, nor would it seem necessary. In *Lemon II*, the Court noted the following:

> "(7-9) There has been no demonstration by the appellee schools of the precise amount of any detriment incurred by them during the 1970-1971 school year in the expectation of reimbursement by the state. The complexity of such a determination for each of Pennsylvania's 1,181 non-public schools that contracted with the State under Act 109 is readily apparent.[6] But we need not dwell on the matter of uncertainty. On this record the District Court could reasonably find reliance on the part of the appellee schools and reasonably could conclude no more was needed to demonstrate retrospectively the degree of their reliance."

93 S. Ct. 1463, p. 1471-2.

Footnote 6 reads:

> [6] "As to each school, the determination of actual reliance would be subtle, premised largely on credibility and not on facts of record. Nonreliance could not be assumed simply because expenditure levels remained constant before and after Act 109; any school might well assert that it would have reduced its educational expenditures in some particular but for the expectation of compensation for certain other expenditures incurred in connection with Act 109. Similarly, the inquiry could not be limited to the expenditures for those items specified by the Act. Increased expenditures for any of the gamut of a school's activities might have been incurred in reliance on reimbursement for services covered by Act 109."

CONCLUSION

For the reasons stated, we submit that the statute is neither generally unconstitutional nor unconstitutional in its applications to the Defendant colleges. There is no constitutionally significant difference between these Appellee colleges and the *Tilton* colleges; and as to the nature of the program, a general grant not to be used for sectarian purposes is no more vulnerable than a general grant for any type of buildings not to be used for a sectarian purpose.

The judgment of the Maryland District Court of three judges should be affirmed.

Respectfully submitted,

GEORGE W. CONSTABLE,
Attorney for the College of
Notre Dame of Maryland, Inc.,
1000 Maryland Trust Building,
Baltimore, Maryland 21202.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

JOHN C. ROHLER, III, ET AL., APPELLANTS

v.

BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,
[illegible] C. LEE,
Assistant Attorney General,
[illegible] B. KILPATRICK,
THOMAS G. WILSON,
Attorneys,
Department of Justice,
Washington, D.C. 20530

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74–730

JOHN C. ROEMER, III, ET AL., APPELLANTS

v.

BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The opinion of the three-judge district court (J.S. App. A–1—A–34) is reported at 387 F. Supp. 1282.

JURISDICTION

The judgment of the district court was entered on October 21, 1974 (J.S. App. A–57—A–58). The notice of appeal was filed on October 25, 1974 (J.S. App. A–59) and probable jurisdiction was noted February 18, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

Sections 65–69 of the Maryland Annotated Code, Art. 77A, are set forth at J.S. App. A–52—A–55.

QUESTION PRESENTED

Whether a Maryland statute which authorizes state grants to church-related colleges and universities, but which prohibits the use of those funds for sectarian purposes, violates the Establishment Clause of the First Amendment as applied to the States under the Fourteenth Amendment.

INTEREST OF THE UNITED STATES

The Department of Health, Education, and Welfare operates several programs of financial assistance to institutions of higher education which are in some respects similar to the assistance program established by the Maryland statute that is challenged in this case. The most significant of the federal programs is the Strengthening Developing Institutions Program authorized by Title III of the Higher Education Act of 1965, 79 Stat. 1223–1231, as amended, 20 U.S.C. 1051–1056, which provides for grants to developing institutions of higher education for institutional improvement in curriculum, faculty development, administration, and student services.[1] Like the Maryland statute,

[1] Other federal programs having features similar to the Maryland assistance program are the Veterans' Cost-of-Instruction

the Higher Education Act contains a restriction on the use of funds for sectarian purposes, *viz.*, "[n]one of the funds * * * shall be used for a school or department of divinity or for any religious worship or sectarian activity" (20 U.S.C. (Supp. III) 1056).

In fiscal year 1975 the appropriation for this program exceeded $110 million and grants were made to 207 institutions. A significant number of grants are made to institutions that appear to have some of the same church-related characteristics as the institutions involved in this case. Thus, this Court's decision is likely to have a significant impact on the operation of this federal program.[2]

STATEMENT

In 1971, a Maryland statute authorizing the payment of state funds to any private institution of higher education in the state that meets certain minimum criteria, and that does not award only seminarian or theological degrees, was enacted. Art. 77A, § 65, *et seq.*,

program (20 U.S.C. (Supp. III) 1070c–1), the Cooperative Education program (20 U.S.C. 1087a–1087c), the Improving Training Opportunities for Non-Higher Education Personnel program (20 U.S.C. 1119–1119a–1), the Training Programs for Higher Education Personnel (20 U.S.C. 1119b–1119b–1), and the Undergraduate Institutional Equipment program (20 U.S.C. 1121–1129a).

[2] The various other federal programs listed in n. 1, *supra*, will also be affected by the decision in this case to some extent. These programs differ from the Maryland statute in that generally in each case the grants are made for specific purposes. There are, however, elements of a general grant program present in each case that is essentially similar to the Maryland statute. The total fiscal 1975 appropriation for these programs exceeded $215 million.

Md. Ann. Code. The Act was amended in 1972 to provide that "[n]one of the moneys payable under this subtitle shall be utilized by the institutions for sectarian purposes." Art. 77A, § 68A, Md. Ann. Code.

The assistance program established by the Act is administered by the Maryland Council for Higher Education. Initially, the Council screens grant applicants to eliminate those institutions that primarily award seminarian or theological degrees. The Council has also developed procedures to determine if grants have been used for sectarian purposes. Under these procedures, a verification is required from the president of the recipient institution, prior to receipt of a grant, that funds will not be improperly expended (J.S. App. A–48). One year later, a second, similar verification is required, together with a description of the uses to which the funds were put. A subsequent audit by the State may be made, if it is determined to be necessary (*ibid.*)

The plaintiff Maryland taxpayers brought this suit against the appropriate Maryland officials, and five allegedly church-related private colleges that have received grants under the statute, contending that the Maryland statute violated the Establishment Clause of the First Amendment (J.S. App. A–2—A–3).[3] Since plaintiffs sought to enjoin the operation of the statute on constitutional grounds, a three-judge court was properly convened under 28 U.S.C. 2281 (J.S. App. A–4). After trial that court made findings of fact

[3] There were eighteen private colleges in Maryland receiving State aid at the time this suit was filed.

(J.S. App. A–35—A–51) and, based on those findings, sustained the constitutionality of the Maryland statute by a 2–1 vote.

Each of the four institutions that remain parties in the case—Mt. St. Mary's, Loyola, Notre Dame of Maryland, and St. Joseph's—are affiliated with the Catholic Church and the majority of the students at those institutions are members of the Catholic faith.[4] The three-judge court found that, although the colleges were church-related, "at none of the defendants is religious indoctrination a substantial purpose or activity," and the encouraging of "spiritual development of the students" is a secondary objective of the schools (J.S. App. A–43, A–45). Thus, while religious exercises are held on each campus, attendance is not required. Although classes in some of the secular courses begin with a prayer, this occurs at the teacher's option, student participation is voluntary, and "there is no actual college policy encouraging prayer in class" (J.S. App. A–39).

The court further found that faculty hiring was not based upon religion, since at two of the schools no inquiry was made concerning the applicant's religion, while at the other two schools hiring is based mainly upon academic qualifications (J.S. App. A–40—A–41). In short, the court found that the defendant colleges operated their secular classes on the basis of

[4] One of the original defendants—Western Maryland College—terminated its affiliation with the Methodist Church after the suit was filed, and was dismissed from the suit. St. Joseph's College has ceased operations. Since, however, it received state funds in the past, it remains an appellee.

principles of academic freedom and without religious bias.[5]

Based upon the foregoing findings of fact, the court concluded that the Maryland statute was constitutionally valid under the applicable standards of this Court's Establishment Clause decisions. The court found that the statute had the secular purpose of saving the taxpayers' money which would otherwise have to be spent in expanding public institutions; that the statute did not have a primary effect of advancing religion because the schools were not pervasively sectarian; and that there were, in general, sufficient safeguards to ensure that funds were not used to support religious activity.

Finally, the court ruled that the statute did not result in excessive governmental entanglement in religion (J.S. App. A–14—A–23). It ruled that the defendant colleges were similar to those involved in *Tilton* v. *Richardson,* 403 U.S. 672 and that there was no constitutionally significant difference between the

[5] The court qualified its ruling with respect to religion and theology courses offered by the defendant institutions (J.S. App. A–12—A–13). Although it found that academic freedom prevailed in secular courses, the court was unable so to characterize theology and religion courses. Since these courses are mandatory and are taught by clerics, the court held that absent proof that the courses are offered as an academic discipline, state aid cannot be justified (J.S. App. A–13). Accordingly, the Maryland Council for Higher Education was directed to take steps to ensure that state funds are not used to support such courses (*ibid.*).

type of assistance upheld in *Tilton* and that available under the Maryland statute.[6]

ARGUMENT

The purpose of the Establishment Clause is to protect against "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz* v. *Tax Commission,* 397 U.S. 664, 668. This Court has developed three criteria to be applied in determining whether a statute authorizing public assistance to church-related institutions is consistent with the purpose of the Establishment Clause: such a statute must have a secular purpose; it must not have a primary effect of advancing religion; and it must not foster an excessive government entanglement with religion. *Lemon* v. *Kurtzman,* 403 U.S. 602, 612–613; *Meek* v. *Pittenger,* No. 73–1765, decided May 19, 1975, slip op., p. 8. Moreover, "not all legislative programs that provide indirect or incidental benefit to a religious institution are prohibited by the Constitution" (*id.* at p. 9).

In applying these criteria, the Court apparently has recognized that government financial assistance is less likely either to advance religion or to involve excessive entanglement with religion when the aid is extended to religiously-affiliated institutions of higher education than when it goes to primary or secondary

[6] Judge Bryan dissented, concluding that because the Act had the potential to advance religion and to create excessive entanglement, it violated the Establishment Clause (J.S. App. A–26—A–34).

schools. Cf. *Tilton* v. *Richardson*, 403 U.S. 672; *Hunt* v. *McNair*, 413 U.S. 734. The rationale of this distinction was explained in the plurality opinion in *Tilton*, where the Court upheld the constitutionality of construction grants under the Federal Higher Education Facilities Act of 1963 made to church-related colleges and universities for buildings and facilities used exclusively for secular educational purposes:

> There are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools. The "affirmative if not dominant policy" of the instruction in precollege church schools is "to assure future adherents to a particular faith by having control of their total education at an early age." *Walz v. Tax Comm'n, supra,* at 671. There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination. Common observation would seem to support that view, and Congress may well have entertained it. The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the congressional objectives and limitations. Furthermore, by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influences by virtue of their own internal disciplines. Many church-related colleges and universities seek to evoke free and critical responses from their students and are characterized by a high degree of academic freedom. [403 U.S. at 685–686, footnotes omitted.]

The plurality opinion in *Tilton* further pointed out (p. 687) that "the evidence shows institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education." The record in the present case shows institutions which, although different in some respects from the institutions involved in *Tilton* (see *infra,* pp. 10–11), nonetheless have a similar basic secular mission.

The plurality opinion also pointed out (p. 687):

> Since religious indoctrination is not a substantial purpose of activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education. This reduces the risk that government aid will in fact serve to support religious activities. Correspondingly, the necessity for intensive government surveillance is diminished and the resulting entanglements between government and religion lessened.

These considerations, too, are no less applicable to the colleges involved in this case than they were to the institutions involved in *Tilton.*

Since the appellants concede that the Maryland statute has a secular purpose (Br. 15),[7] the only remaining questions are whether the Act has a primary

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[7] This concession is well-founded in light of the district court's findings concerning the benefits that inure to the state from the existence of the private colleges (J.S. App. A–37—A–38). As in *Tilton*, the state grants serve to maintain opportunities for higher education. *Tilton, supra*, 403 U.S. at 678–679.

effect of advancing religion and whether it results in excessive entanglement between government and religion. Both questions must be answered negatively.

1. "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." *Hunt* v. *McNair, supra,* 413 U.S. at 743. The aid provided under the Maryland statute does not have a primary effect of advancing religion.

a. The district court correctly concluded that the defendant colleges "conform closely to the colleges approved in *Tilton* v. *Richardson*" and that therefore they "are not so pervasively sectarian that aid would have a primary effect of advancing religion" (J.S. App. A–10—A–11). Courses are taught according to the principle of academic freedom and the faculties of the colleges "feel no religious pressures, by anyone, on their classroom presentation or their selection of texts and course materials" (J.S. App. A–38). The district court found that the colleges hiring practices were consistent with the maintenance of academic freedom, since the main criteria for hiring are academic qualifications and not an applicant's religion (J.S. App. A–40—A–41).

The colleges are not sectarian simply because some instructors, without encouragement from the college administrations, elect to open classes with a prayer. Participation in the prayers is voluntary and the students involved are young adults. See *Abington School*

District v. *Schempp,* 374 U.S. 203, 252–253, 298, 316 (concurring and dissenting opinions of Justices Brennan and Stewart). The district court correctly concluded that the practice of optional classroom prayers does not diminish "the atmosphere of intellectual freedom which marks these colleges" (J.S. App. A–40).

The district court properly found that there was "clear and convincing evidence" that at these colleges, like the institutions involved in *Tilton* v. *Richardson, supra,* courses are taught " 'according to the academic requirements intrinsic to the subject matter and the individual teacher's concept of professional standards' " (J.S. App. A–40).[8]

b. The district court also correctly found (J.S. App. A–11–A–12) that, aside from grants for religion or theology courses, which the court invalidated, the Act would not be used to finance "a specifically religious activity." Indeed, the Act expressly prohibits any aid from being used "for sectarian purposes." Art. 77A, § 68A, Md. Ann. Code. Compliance with this statutory prohibition is adequately ensured by the requirement that the presidents of recipient institutions verify the proper use of the funds both before and after receipt and submit a description of the use

[8] In *Americans United for Separation of Church & State* v. *Bubb,* 379 F. Supp. 872 (D. Kan.), a three-judge court found that colleges similar to those involved here were not pervasively sectarian. The finding that the defendant schools are not pervasively sectarian distinguishes *Meek* v. *Pittenger, supra,* No. 73–1765, decided May 19, 1975, since the schools in those cases had a "predominately religious character" (No. 73–1765, slip op., p. 13).

of the funds. A further protection against the use of funds for religious activities is provided by the possibility of a State audit.

Tilton v. *Richardson, supra,* 403 U.S. at 679, and *Hunt* v. *McNair, supra,* 413 U.S. at 744, demonstrate that a statutory limitation on the use of funds for sectarian purposes coupled with administrative safeguards, can provide sufficient assurance that public assistance will not have a primary effect of advancing religion. As the plurality opinion in *Tilton* stated (403 U.S. at 679):

> A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement. There is nothing new in this argument. But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional.

2. Whether excessive government entanglement exists depends upon "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Lemon* v. *Kurtzman, supra,* 403 U.S. at 615. Under these standards, the Maryland statute does not foster excessive government entanglement with religion.

Only three of the 17 colleges that receive aid under the Maryland Act are church-related. The present statute thus stands in sharp contrast to the Pennsylvania aid plan condemned in *Meek* v. *Pittenger, supra,* where more than 75 percent of the non-

public schools receiving aid were "church-related or religiously affiliated educational institutions"—a consideration that led the Court in *Meek* to describe "the primary beneficiaries" of the program as "nonpublic schools with a predominant sectarian character" (No. 73–1765, *supra,* slip op. at p. 14). In the present case, however, the "primary beneficiaries" of the Maryland program are wholly secular institutions, and the few colleges with sectarian affiliations are, as shown, basically secular in their orientation and operation. Moreover, unlike the statute involved in *Meek,* the Maryland Act does not provide any "massive aid" to church-related nonpublic schools (*ibid.*).

It is particularly significant that, as shown above (pp. 10–11, *supra*), the colleges involved in this case, like the colleges in *Tilton* and *McNair,* are not pervasively sectarian, since the degree of entanglement "varies in large measure with the extent to which religion permeates the institution." *Hunt* v. *McNair, supra,* 413 U.S. at 746. To repeat what was said in the plurality opinion in *Tilton* v. *Richardson, supra,* 403 U.S. at 687:

> Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education. * * * Correspondingly, the necessity for intensive government surveillance is diminished and the resulting entanglements between government and religion lessened.

While the grants authorized by the Maryland statute are more general than the facility construction grants involved in *Tilton* and the bonding authority involved in *McNair,* in view of the facts that the recipient colleges are not pervasively sectarian and that their secular course programs are marked by a commitment to the principle of academic freedom, the state grants are not impermissibly ideological.

Finally, there is no constitutionally significant difference between the church-government relationships in *Tilton* and *McNair,* and that present here. Although in those cases the form of assistance was essentially a single event, the relationships created were continuing because of the necessity for inspections of the facilities. The submission of verifications twice a year as required by the Maryland program, even if occasionally followed up with a simple State audit, do not result in a degree of contact between church and State that is greater than that required by the relationship in *Tilton.*

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
REX E. LEE,
Assistant Attorney General.
STEPHEN F. EILPERIN,
THOMAS G. WILSON,
Attorneys.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-730

JOHN C. ROEMER, III, EDWARD E. DOERR, KENNETH A. STEVENS, and CYNTHIA KOONCE MILLER,
Appellants,

v.

BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND; MARVIN MANDEL, Governor; LOUIS L. GOLDSTEIN, Comptroller; JOHN A. LUETKEMEYER, Treasurer; COLLEGE OF NOTRE DAME; MOUNT SAINT MARY'S COLLEGE; SAINT JOSEPH COLLEGE; and THE ASSOCIATED PROFESSORS OF LOYOLA COLLEGE OF THE CITY OF BALTIMORE, INC.,
Appellees.

On Appeal from a Three Judge United States District Court for the District of Maryland

Brief of the Association of American Colleges, the American Council on Education, the Association of Jesuit Colleges and Universities, the Council for the Advancement of Small Colleges, the National Association of Schools and Colleges of the United Methodist Church, the National Catholic Educational Association, and the National Council of Independent Colleges and Universities, Amici Curiae

CHARLES M. WHELAN
Fordham Law School
New York, New York 10023
Attorney for Amici Curiae

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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INTRODUCTORY STATEMENT

The facts of record in this case, the pertinent Maryland statutes, the pertinent provisions of the United States Constitution, the opinion of the court below, the

basis for jurisdiction in this Court, and the issues directly raised on this appeal are adequately set forth in the briefs filed on behalf of the Maryland Board of Public Works and the appellee colleges. All parties have consented in writing to the filing of this brief *amicus curiae* by the Association of American Colleges and the other organizations that have joined in this brief.

These *amici* fully support the constitutionality of Article 77A, §65 et seq. of the Maryland Annotated Code. The district court properly upheld the constitutionality of this statute as applied to the appellee colleges, and its judgment—with one important exception—should be affirmed. The exception relates to the district court's prohibition against any use of the public funds to support the theology and religion courses at the appellee colleges. This prohibition by the district court was an error and should be corrected.

Since none of the appellee colleges or the Board of Public Works has cross-appealed with respect to this prohibition, it might appear that the propriety of this prohibition is not properly before the Court in this case. Cf. *Meek* v. *Pittenger,* 43 L.W. 4596, 4598, fn. 7 (May 19, 1975). There can be no doubt, however, of the jurisdiction of this Court to modify the prohibition *sua sponte.* If the Court has jurisdiction to affirm the prohibition, the Court necessarily has jurisdiction to correct any error it contains.

If, however, the Court should judge that this case is not an appropriate vehicle for determining the propriety of the restriction, the *amici* filing this brief urge the Court to make an explicit reservation on the subject of the restriction. Such a reservation will pre-

vent any inference that the Court has approved the propriety of the restriction.

INTEREST OF THE AMICI

The Association of American Colleges and the other *amici* joining in this brief are gravely concerned about the misinterpretations that could result if this Court were simply to affirm the judgment of the court below. Such an affirmance would generate considerable confusion about the standards that lower courts should employ in determining whether a particular program of religious studies is truly academic or not. Moreover, such an affirmance might even raise doubts about the proper standards for determining the academic integrity of religious studies programs in public colleges and universities.

The *amici* filing this brief regard the academic study of religion as an essential part of a liberal arts education. Accordingly, the *amici* are profoundly concerned about preserving correct judicial standards for determining whether a particular program of religious studies is academic or sectarian. The creation of false criteria by the federal and state courts is certain to interfere with the academic study of religion in both public and nonpublic colleges and universities. Such interference would do irreparable harm to American higher education.

The Association of American Colleges is the national organization of colleges of liberal arts and sciences, whether self-contained institutions or parts of complex universities. It admits to its membership any duly accredited institution, regardless of affiliation and governance, that devotes a substantial share of its resources to providing undergraduates with a liberal ed-

ucation as distinct from professional or vocational training. The present membership of the Association in the United States (excluding three overseas institutions) comprises 738 colleges and universities—94 maintained by federal, state or local government and 644 controlled by independent boards of trustees, with or without some degree of affiliation with religious bodies. The total membership constitutes more than 50 percent of all accredited four-year institutions in the country.

The American Council on Education is a council of national and regional education associations and institutions of higher education. Since its founding in 1918, the Council has been a center of coordination for the improvement of education at all levels, with particular emphasis on higher education. Its membership and its activities reflect the peculiar genius of the American educational system—a system without national control, comprising a large number of autonomous units working together for the establishment and improvement of educational standards, policies, and procedures. Current Council membership comprises: 176 national and regional associations and organizations; 1,386 accredited institutions of higher education, including the four institutions involved in the case at bar; and 76 affiliated institutions and organizations.

The Association of Jesuit Colleges and Universities was formed in 1970 to effect better cooperative efforts among the 28 Jesuit colleges and universities throughout the United States, to promote the objectives of private and church-related higher education, and to assist other associations, groups and institutions pursuing the same goals. These 28 institutions include 6 moderately large universities, 8 four-year colleges, and 14

which offer degree programs through the Masters level. They are in 18 states and the District of Columbia, located for the most part in urban areas. Many of these institutions are the oldest in their respective states and have a proud tradition of liberal education.

The Council for the Advancement of Small Colleges (CASC) is a national, voluntary association dedicated to the promotion and advancement of small, independent private colleges of liberal arts and sciences. The Council plans and implements programs of mutual self-help, self-examination, and professional advancement for member colleges. The present membership comprises 154 liberal arts colleges in 40 states that enroll 2,000 or fewer undergraduate students. Ninety-eight percent of the colleges are fully accredited by regional accrediting associations, and two percent have attained at least Correspondence Status with their respective association.

The National Association of Schools and Colleges of The United Methodist Church is an incorporated body representing 107 colleges and universities, 13 secondary schools, 13 schools of theology, one professional medical college and several other schools with differing educational objectives. These institutions share varying degrees of affiliation with The United Methodist Church, but each operates under an independent board of trustees. Association membership includes 7 major universities which are defined as universities by their sponsorship of professional and graduate schools, 81 senior colleges and 19 two-year institutions. Academic programs of member institutions represent the full range of arts and sciences, the humanities, the fine arts and the professions.

The Department of Colleges and Universities of the National Catholic Educational Association is a voluntary organization of 219 higher education institutions that are Catholic in their sponsorship or traditions. Regional accreditation is an eligibility requirement for membership. The Department represents and services its members in a variety of areas of common interest. The National Catholic Educational Association has a compelling interest in this case that is not limited to the fact that four of the defendant colleges hold membership in the Association.

The National Council of Independent Colleges and Universities consists of 37 state associations of independent colleges and universities and more than 1000 private, nonprofit institutions of higher education. Organized in 1968, the principal purpose of the Council is to promote and advance the interests of higher education, including both publicly supported and independent colleges and universities, with special concern for the pluralistic nature of the system, its quality, freedom and responsibility.

SUMMARY OF THE ARGUMENT

This Court has already declared that the academic study of religion is supportable by public funds. The appropriateness and academic integrity of religious studies in higher education are amply demonstrated by the number and quality of the colleges and universities, both public and nonpublic, that include them in their curriculum. The almost unanimous public acceptance of the legitimacy of these programs is buttressed by the consensus of legal scholars that the No Establishment Clause does not bar teaching about religion in state-supported higher education. "No institution can consider itself a genuine college or a university if it ignores the place of religion as an intellectual discipline." (page 13)

Thomas Jefferson's plans for the University of Virginia show that what he intended to exclude from the curriculum of the university itself was the sectarian, not the academic, study of religion. James Madison concurred in Jefferson's views. In most 19th-century American colleges and universities, however, this strict compartmentalization of religion and education did not exist. Today there is general agreement that only the academic study of religion may be financed by public funds.

Public support of the academic study of religion serves important secular purposes, does not have a primary effect of advancing or inhibiting religion, and does not result in excessive governmental entanglement with religion. The government may support such study in private colleges and universities that meet the *Tilton* and *Hunt* criteria as well as in publicly owned and operated institutions.

The district court should not have enjoined the appellees from using any part of the state funds to support the study of religion. The district court, despite a full trial, refused to make any finding on whether the study of religion at the appellee colleges was academic or sectarian. The district court, however, did determine that the appellee colleges conformed closely to the colleges approved in *Tilton* v. *Richardson,* that they were not pervasively sectarian, and that all of the courses—including the religion courses—were taught "according to the academic requirements of the subject matter." The district court also determined that the appellee colleges were characterized by a high de-

gree of institutional autonomy, that the affiliated churches exercised no control over the budget or policies of the schools, and that each of the appellee colleges admitted students and hired faculty who were not members of the affiliated church. None of the appellee colleges required attendance at religious services.

In light of these findings, it was clearly erroneous for the district court not to hold the appellants to their burden of proof on the issue of the academic or sectarian character of the courses in religious studies at the appellee colleges. The injunction that the district court issued was not justified by the district court's concern about a "possibility" of "sectarian overtones." Neither was the injunction justified by the other factors to which the district court gave excessive weight: the limited array of courses at the appellee colleges, and the religious affiliation of the faculty members teaching such courses. The plaintiffs failed in their burden of proof, and the district court's concern about the bare possibility of some secondary sectarian dimension in the religion courses at the appellee colleges was not a sufficient warrant for excluding those courses from public support under the Maryland law.

ARGUMENT

I. The Government May Support the Academic Study of Religion in Colleges and Universities, Both Public and Non-Public.

This Court has already declared that the academic study of religion is supportable by public funds. In *School District of Abington Township* v. *Schempp,* 374 U.S. 203, 225 (1963), Mr. Justice Clark wrote for the majority:

> In addition, it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistent with the First Amendment.

Subsequently, in *Epperson* v. *Arkansas,* 393 U.S. 97, 106 (1968), Mr. Justice Fortas wrote for the Court:

> While study of religion and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program of education, need not collide with the First Amendment's prohibition, the State may not adopt programs or practices in its public schools or colleges which "aid or oppose" any religion.

In these passages the Court has distinguished the academic study of religion from the sectarian study of religion. The distinction turns on the methodology and the purpose of the instruction, not on the belief or disbelief of the instructor or the institution in the subject matter. When "presented objectively as part of a secular program of education," religious studies may be supported by the state and federal governments.

There is nothing contrary to this constitutional principle in *Tilton* v. *Richardson,* 403 U.S. 672 (1971), or *Hunt* v. *McNair,* 413 U.S. 734 (1973). These decisions establish certain criteria that church-related colleges and universities must meet if they are to participate in government programs of aid to higher education. These decisions also hold that the programs of instruction that the government may assist at church-related

colleges and universities must be secular, that is, comparable to instruction provided at public colleges and universities and both separable and actually separated from the sectarian education and activities at the church-related colleges. There is nothing in *Tilton* or *Hunt* that says that religious studies at a church-related college or university are inherently suspect, much less that all religious studies are inherently sectarian.

The appropriateness and academic integrity of religious studies in higher education are amply demonstrated by the number and quality of the colleges and universities, both public and nonpublic, that include them in their curriculum. At the trial in this case, Dr. Samuel H. Magill, an Executive Associate on the staff of the Association of American Colleges, testified about the present extent of these studies. The defendants also introduced statistical material into evidence from Claude Welch, *Religion in the Undergraduate Curriculum* (Association of American Colleges; 1972). This statistical material is Defendants' Exhibit No. 1.

Dr. Magill's testimony and the statistical evidence show that in 1969-70 there were somewhat over 1300 four-year colleges and universities in the United States. Of this number, 870 offered either courses or full programs in religion. (Tr. 1633-34.) About 57% of all public colleges and universities, 67% of all private, independent colleges and universities, and close to 100% of the church-related colleges and universities offer courses in religion (Tr. 1635.) The greatest increase in course and program offerings in religious studies over the last 25 years has been in the public sector (Tr. 1637.)

Of particular significance are Tables 8 and 9 in Defendants' Exhibit No. 1, which were explained by Dr.

Magill in his testimony (Tr. 1640-43) and are summarized on pp. 56-57 of Claude Welch, *Religion in the Undergraduate Curriculum*:

> One further variable is important to note in relation to the distribution of programs of religious studies, namely, institutional quality. It appears that, second to religious affiliation, the presence of a religious program is most strongly associated with the academic quality of an institution. The higher the quality the greater the likelihood of there being a program of religion. This appears from two comparative studies, one using Cass and Birnbaum's ratings of institutions according to selectivity in admissions, and the other using the resource index score developed by George Nash in a study made from the Bureau of Applied Social Research, Columbia University.

Of the schools ranked by Cass and Birnbaum in the top selectivity group, 79% have an organized religion program. Of the schools ranked by the Nash Resource Index as high resource institutions (the top 13% in the country), 85% have a religion program. The colleges and universities that ranked lower on both indexes also ranked lower in the percentages offering religious studies. The Cass-Birnbaum and the Nash ratings are highly regarded in the academic community. (Tr. 1641-42.)

The subject of religious studies in the higher education curriculum, both public and nonpublic, has been studied extensively in many publications since World War II.[1] Very significantly, however, there has been

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[1] In addition to the Welch study, *supra*, the following works are of particular importance to an understanding of the range and extent of religious studies in American higher education: Gauss (ed.), *The Teaching of Religion in American Higher Education*

almost no litigation with respect to religious studies programs in higher education, even at public colleges and universities. In sharp contrast to the many cases dealing with religion in the public elementary and secondary schools and with aid to education in parochial elementary and secondary schools, there are only two reported cases dealing with religious studies at public institutions of higher learning. In the first of these, *State* ex rel. *Sholes* v. *University of Minnesota,* 236 Minn. 452, 54 N.W. 2d 122 (1952), the plaintiffs' suit was dismissed on procedural grounds. In the second, *Calvary Bible Presbyterian Church* v. *Board of Regents of the University of Washington,* 72 Wash.2d 912, 436 P.2d 189 (1967), the Supreme Court of Washington sustained the constitutionality of the state university course in "The Bible as Literature," and this Court denied certiorari. 393 U.S. 960 (1968).

(1951); Hartzell and Sasscer (ed.), *The Study of Religion on the Campus Today* (1967); Holbrook, *Religion, A Humanistic Field* (1963); Littell, *Church, State, and University,* 1963 Religion and the Public Order 78 (1964); McLean and Kimber, *The Teaching of Religion in State Universities* (1960); McLean (ed.), *Religious Studies in Public Universities* (1967); Michaelsen, *The Scholarly Study of Religion in College and University* (1964), *The Study of Religion in American Universities* (1965); Novak, *Ascent of the Mountain, Flight of the Dove* (1972); Phenix, *Religion in Public Education: Principles and Issues,* 14 J. Church and State 420 (1972); Ramsey and Wilson (ed.), *The Study of Religion in Colleges and Universities* (1970); Spivey, *Modest Messiahs: The Study of Religion in State Universities,* 63 Religious Education 5 (1968); Walter (ed.), *Religion and the State University* (1958); Welch, *Graduate Education in Religion: A Critical Appraisal* (1971); Wittenberg, *The Relationship Between Religion and the Educational Function of the University,* in *Religion and the University* (1964); Ziemke, *An Experiment in the Teaching of Religion: The University of North Dakota,* 59 Religious Education 410 (1964).

The almost unanimous public acceptance of the legitimacy of these programs is buttressed by the consensus of legal scholars that the No Establishment Clause does not bar teaching about religion in state-supported higher education. The views of the late Professor Paul Kauper are typical of most of the other constitutional authorities who have addressed the question:

> As long as courses in religion are optional with the student, preference is not given to any single religious faith, the instruction is aimed at understanding and not indoctrination or commitment, and the university insists on observance of its usual academic and scholastic standards with respect to the teachers giving the courses, a persuasive case may be made that this program does not fall within the "sectarian education" category. ("Law and Public Opinion," in *Religion and the State University* 84 [ed. Walter; 1958].)

Returning to the same topic in a book published a year after the *Schempp* decision, Professor Kauper restated his position as follows:

> No institution can consider itself a genuine college or a university if it ignores the place of religion as an intellectual discipline. The very fact that we have curricula in religion at our state institutions and that the matter continues to be the subject of much study marks an awareness by our educational leaders that religion must find its place in the total educational system. Indeed, it has been persuasively argued that the study of theology is appropriate to a state institution. No state university can have a theological position any more than it can have a political position. But just as freedom from a political position does not preclude a study of political science, so lack of commitment to a theological position does not

> preclude a study of theology. What is important is that the state should not promote a particular theology for purposes of religious indoctrination, but that rather it should afford opportunity for study of religious ideas, religious behavior, and religious institutions at the hands of competent scholars. A university offers the widest latitude to teachers in presenting value systems and avenues to the pursuit of truth. It is hardly neutral if it denies opportunity for teaching, research, and study centered on religion in its historical, theological, institutional, and social aspects. (*Religion and the Constitution* 98-99 [1964].)

It would be a waste of this Court's time to pile quotation upon quotation to demonstrate the consensus of legal scholars that the No Establishment Clause does not bar the academic study of religion in state colleges and universities.[2] It should be sufficient to note that Leo Pfeffer also agrees that state-supported colleges and universities may engage in the academic study of religion.[3]

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[2] A comprehensive collection of the authorities can be found in McGonagle, *Teaching About Religion in the Public College and University,* 20 American Univ. L. Rev. 74 (1970). Among the most important works by legal scholars are the following: Casad, *On Teaching Religion at the State University,* 12 Kan. L. Rev. 405 (1964); Katz, *Religious Studies in State Universities,* 1966 Wis. L. Rev. 297; Kauper, *Religion, Higher Education and the Constitution,* 19 Ala. L. Rev. 275 (1967) (in addition to the two works cited in the body of this brief); Ladd, *Public Education and Religion,* 13 J. Pub. L. 310 (1964); Louisell and Jackson, *Religion Theology, and Public Higher Education,* 50 Calif. L. Rev. 751 (1962); Michaelsen, *The Legal Syndrome and the Study of Religion,* 35 J. Higher Education 373 (1964), and *The Supreme Court and Religion in Public Higher Education,* 13 J. Pub. L. 343 (1964).

[3] Pfeffer, *Church, State and Freedom* 423 (1953), 507-8 (rev. ed. 1967).

Many of the authors who have written on this subject have taken note of Thomas Jefferson's plans for the study of religion at the University of Virginia. Because of Jefferson's special place in the history of American education and religious freedom, his concepts deserve special scrutiny.[4]

As the minutes of the Board of Visitors of the University of Virginia for October 7, 1822 show,[5] Jefferson and the other members of the board agreed that a "chasm" would exist at the university if no provision were made for the study of "the various creeds of religious faith existing among our citizens."

> [T]he relations which exist between man and his Maker, and the duties resulting from those relations are the most interesting and important to every human being, and the most incumbent on his study and investigation.

Jefferson, however, did not want the University of Virginia to engage in sectarian teaching and was opposed to the establishment of "any professorship of divinity" in the university. He agreed to instruction in the Hebrew, Greek and Latin languages and to "courses of ethical lectures, developing those moral obligations in which all sects agree." But he was adamantly opposed to the university itself engaging in the same kind of religious instruction that would be found in the "sectarian schools of divinity."

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[4] See, for example, Butts, *The American Tradition in Religion and Education* (1950); Healey, *Jefferson on Religion and Public Education* (1962); Honeywell, *The Educational Work of Thomas Jefferson* (1931; reissued 1964).

[5] Padover (ed.), *The Complete Jefferson* 957-58 (1943).

Jefferson's solution was to encourage the various sects to establish their own schools of divinity "on the confines of the University." The students destined "for the religious professions" could then obtain their full secular education at the university and their sectarian education at the surrounding church institutions. Under this plan, the university could stay free of the "jealousies of the different sects."

At first blush, then, it would appear that Jefferson excluded the study of religion from the state university. That interpretation, however, is quite superficial. Close attention to the curricula that Jefferson proposed for the University of Virginia shows conclusively that what Jefferson intended to exclude was the sectarian, not the secular, study of religion.[6] All of the curricula include Moral Philosophy or Ethics, subjects that inevitably touch upon religious matters. In the "Rockfish Report," Jefferson and the other members of the Board of Commissioners for the University of Virginia gave a detailed explanation of the aims and curriculum they proposed for the university. The key passage on religious studies reads as follows:[7]

> In conformity with the principles of our Constitution, which places all sects of religion on an equal footing, with the jealousies of the different sects in guarding that equality from encroachment and surprise, and with the sentiments of the Legislature in favor of freedom of religion, manifested on former occasions, we have proposed no professor of divinity; and the rather as the proofs of the being of a God, the creator, preserver, and supreme ruler of the universe, the author of all the relations of morality, and of the laws and obligations these infer, will be within the province of the professor of ethics; to which adding the developments of these moral obligations, of those in which all sects agree, with a knowledge of the languages, Hebrew, Greek, and Latin, a basis will be formed common to all sects. Proceeding thus far without offence to the Constitution, we have thought it proper at this point to leave every sect to provide, as they think fittest, the means of further instruction in their own peculiar tenets.

[6] A convenient chart of these curricula may be found in Honeywell, *The Educational Work of Thomas Jefferson* 110-11 (1931; reissued 1964).

[7] Padover (ed.), *The Complete Jefferson* 1104 (1943). The meeting of the commissioners at Rockfish Gap occurred August 1-4, 1818.

By today's standards, Jefferson's professor of ethics was hardly nonsectarian. Nevertheless, the point is clear that what Jefferson meant to exclude from the University of Virginia was not the secular study of religion, but the sectarian rivalries of his day. Fortunately, even though Jefferson's plan for the peripheral seminaries was never realized, his hopes for greater religious tolerance and peace have achieved some realization through the growth of the ecumenical spirit and interdenominational cooperation.

As is well known, the views of James Madison, another progenitor of the First Amendment, were generally similar to Jefferson's on religion and education. Madison, as Rector of the University of Virginia, insisted in 1829 that "provisions for religious instruction and observance among the students" be made by the students themselves or their parents and guardians.[8] There is no evidence that he changed the duties of the

[8] Butts, *The American Tradition in Religion and Education* 130 (1950).

professor of ethics. Moreover, it is interesting to note that although Madison vetoed the incorporation of the Protestant Episcopal Church in the District of Columbia,[9] he signed the Congressional charter of Georgetown University, an institution he must have known was Roman Catholic and Jesuit.[10]

The special role of Madison and Jefferson in the development of American religious freedom is beyond dispute. At the same time, it would be a gross distortion of history to read into the First Amendment everything that Madison and Jefferson wrote about religious freedom,[11] particularly with respect to education. The views of Madison and Jefferson were much stricter than those shared by most members of the first Congresses, as is amply shown by the provisions those Congresses made for the support of religion and education in the federal territories.[12] And so far as the state legislatures were concerned, Virginia's severity in religious matters was a distinct exception—shining, perhaps, but singular. Even the most devout admirers of Madison and Jefferson concede that the careful compartmentalization of religion and education at

[9] Richardson, *Messages and Papers of the Presidents* 489-90 (1896).

[10] Act of March 1, 1815, 6 Stat. 152.

[11] Howe, *The Garden and the Wilderness* (1965).

[12] The early territorial ordinances did not provide for the support of the ministry as such, but they clearly envisaged a religious dimension in education. "Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Northwest Ordinance of 1787, Art. 3. This Ordinance was reenacted August 7, 1789, by the first session of the First Congress under the Constitution. 1 Stat. 549. The language of Article 3 was repeated in the Southwest Ordinance of 1790.

the University of Virginia was not typical of other 19th-century state colleges and universities.[13]

Today, of course, after the late 19th-century incorporation of the "Blaine Amendment" in most state constitutions and after this Court's decisions of the last thirty years, no one could seriously contend that public institutions of higher education are constitutionally free to engage in the kind of sectarian instruction that was prevalent through much of the 19th century. Indeed, during the period between World War I and World War II, there was a great decline in religious studies of any kind at state colleges and universities and even in the private, independent sector. Since World War II, however, there has been a great resurgence in religious studies, not of the sectarian type, but as a distinctly academic discipline.[14] As we have already shown, a widespread consensus of the public, of legal scholars and of academicians supports the legality and propriety of secular religious studies at public as well as private colleges and universities.

During the last thirty years, this Court has articulated three guidelines to help in determining whether a particular law violates the No Establishment Clause. Since the Free Exercise Clause also plays a critical role in the resolution of church-state problems, there are

[13] Butts, *The American Tradition in Religion and Education* 130 (1950): "At a time when, in most colleges and universities of the country, ministers were presidents and commonly members of boards of control, daily chapel attendance was compulsory, courses in religion were required, and professors of theology and doctors of divinity had a prominent place on the faculties, the University of Virginia stood out sharply in contrast with its loyalty to the principle of separation of church and state."

[14] Testimony of Dr. Magill at the trial (Tr. 1634-35).

four questions, as Chief Justice Burger noted in his opinion in *Tilton* v. *Richardson* (403 U.S. at 678), that must be answered whenever a challenge is made to the constitutionality of a particular state program under the Religion Clauses of the First Amendment:

> First, does the Act reflect a secular legislative purpose? Second, is the primary effect of the Act to advance or inhibit religion? Third, does the administration of the Act foster an excessive government entanglement with religion? Fourth, does the implementation of the Act inhibit the free exercise of religion?

In their briefs in this case, the Maryland Board of Public Works and the appellee colleges have shown that the answers to these questions establish the constitutionality of Article 77A, § 65 et seq., of the Maryland Annotated Code, as the statute was applied to the colleges in this case by the district court. The *amici* filing this brief urge this Court to hold that the answers to the four constitutional questions also establish the permissibility of governmental support of the academic study of religion at the appellee colleges.

The secular purpose in governmental support of the academic study of religion derives from several considerations:

(1) The academic study of religion is widely regarded as an essential part of a liberal arts education. The provision of such education is one of the most important functions of government.

(2) Preservation of the values protected by the First Amendment will be impossible unless the leadership of our country has a sound knowledge of religion and religious institutions, as well as of government and political institutions.

(3) The interplay of law and religion in our society is so constant and so complex that it is desirable for the citizenry to have an opportunity to make a serious study of what religion has meant and still means in American life.

(4) To the extent that education has an ethical dimension, it is impossible to exclude the study of religion and still provide an adequate course of instruction in the value systems that have motivated and still motivate human behavior.

Government support of the academic study of religion will not have a primary effect of advancing or inhibiting religion. In the cases in which the primary effect test has been applied so far, only two types of laws have been held unconstitutional: government support of sectarian instruction and religious exercises in the public schools,[15] and special governmental assistance for the education of children in church-related elementary and secondary schools.[16] As Mr. Justice Powell said for the Court in *Hunt* v. *McNair:*[17]

> Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.

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[15] *Illinois ex rel. McCollum* v. *Board of Education,* 333 U.S. 203 (1948); *Engel* v. *Vitale,* 370 U.S. 421 (1962); *School Dist. of Abington Township* v. *Schempp,* 374 U.S. 203 (1963).

[16] Most recently, in *Meek* v. *Pittenger,* 43 L.W. 4596 (1975).

[17] 413 U.S. at 743.

In the present case the trial court found that the appellee colleges "are not so pervasively sectarian that aid would have a primary effect of advancing religion." [18] With respect to the theology and religion courses at the appellee colleges, the trial court did not find that they were a "specifically religious activity." Rather, the court declared that "a possibility existed that these courses could be devoted to deepening religious experiences in the particular faith rather than to teaching theology as an academic discipline." [19] It is quite clear, however, that the district court was simply speculating about this possibility. Had any hard evidence existed, the court would surely have found that the study of religion at one or more of the appellee colleges was sectarian, not academic, and therefore, not supportable by public funds. As will be shown more fully in the next section of this brief, this "speculation about possibilities" was an error by the district court in a case involving higher education at a college that was found to have met the *Tilton* and *Hunt* criteria.

Finally, there is no reason to fear excessive government entanglement, either administrative or political, in programs of governmental support for the academic study of religion in institutions of higher education that are either publicly conducted or that meet the *Tilton* and *Hunt* criteria. The administration, faculty and students of such institutions may safely be trusted to complain whenever a course, ostensibly offered as an academic pursuit, is distorted into a tool of sectarian indoctrination. It is particularly noteworthy in the instant case that the plaintiffs were unable to produce

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[18] 387 F. Supp. at 1287.

[19] 387 F. Supp. at 1288.

a single administrator, faculty member or student at the appellee colleges to support their charge that the religion courses had a dimension or purpose of indoctrination.

In the aid-to-education cases at the elementary and secondary level, this Court has held that the pervasively sectarian character of the church-related schools necessitated close governmental surveillance of many types of assistance, and that the need for such surveillance rendered the programs unconstitutionally entangling. The Court has held just the opposite in the case of church-related colleges and universities that meet the *Tilton* and *Hunt* criteria. The greater maturity of the students, the clear dominance of the secular educational aim, and the self-policing character of institutions that truly enjoy an atmosphere of academic freedom are sufficient guarantees against excessive governmental entanglement.

So far as the free exercise of religion is concerned, it is manifest that the academic study of religion does not result in any coercion against the plaintiffs with respect to their religious beliefs or practices or against anyone else. The argument that the expenditure of public funds for a purpose that is inconsistent with a taxpayer's religion violates the Free Exercise Clause is an argument whose acceptance can only mean fiscal anarchy. If such an argument is accepted, Catholic taxpayers can prevent the public funding of elective abortions, the Amish can destroy the Social Security system, and the Quakers can prevent the defense of the country in time of war. The No Establishment Clause stands as a high barrier against government subsidy of distinctly religious activities, such as worship and sectarian instruction. The Free Exercise Clause does not

stand as a guarantee that public monies will be spent only for purposes that are totally acceptable to all the religions, organized and individual, in the United States.

The decisions of this Court, the practices of the leading state and private colleges and universities, the consensus of the legal scholars, the views of Madison and Jefferson, and the application of the guidelines this Court has established for cases arising under the Religion Clauses of the First Amendment all support the constitutionality of government support for the academic study of religion. It would be astonishing if government could support such study only in institutions that are publicly owned and operated. Fortunately, the decisions of this Court in *Tilton* v. *Richardson,* 403 U.S. 672 (1971), and *Hunt* v. *McNair,* 413 U.S. 734 (1973), hold that the government may support secular studies in private, including church-related, colleges and universities that meet the *Tilton* and *Hunt* criteria. As a result, Maryland is under no constitutional compulsion to exclude the study of religion at appellee colleges from public support, if those colleges meet the *Tilton* and *Hunt* criteria and if the study of religion at these colleges is academic in character.

II. The District Court Should Not Have Enjoined the Appellees from Using Any Part of the State Funds To Support the Study of Religion.

The district court determined that the appellee colleges conformed closely to the colleges approved in *Tilton* v. *Richardson,* that they were not pervasively sectarian, and that all of the courses—including the religion courses—were taught "according to the academic requirements of the subject matter." 387 F. Supp. at 1287. Nevertheless, the district court enjoined the

appellees from using any part of the state funds to support the study of religion.

In Part III of the Findings of Fact, Judge Young states:

> The Court has already stated its view that it is neither legally empowered nor genuinely able to characterize the manner in which theology and religion are studied at these schools. It may be that at each the subjects are approached as complex and intriguing intellectual disciplines. However, a department staffed mainly by clerics of the affiliated church and geared toward a limited array of the possible theology or religion courses affords a congenial means of furthering the secondary objective of fostering religious experience. Only the clearest indication that the religion or theology department is an amalgam of people interested in the study of the religious phenomenon or experience, rather than in experiencing religion, justifies state support of the department in the light of that secondary objective. There has been no such indication for any of these defendants. However, the Court's findings as to the chaplaincy program and the religion or theology courses do not impair the general finding that religious indoctrination is not a substantial purpose or activity of any of these defendants. (387 F. Supp. at 1296.)

In the actual Opinion of the district Court, Judge Young states:

> The only qualification to this general conclusion is as to theology and religion courses. The fact finder was unable to characterize the course offerings in these subjects available at the various defendant schools. Even though academic freedom prevailed at each defendant school and there was no indication that religious indoctrination was a goal of these schools, a possibility existed that these

> courses could be devoted to deepening religious experiences in the particular faith rather than to teaching theology as an academic discipline. Theology or its equivalent is a required course at each school and in each case is taught by a cleric of the affiliated church. Absent a clear indication that the theology was taught as an academic discipline, state aid to such programs cannot be justified. As no such indication exists as to these defendants, the Council on Higher Education must take steps to ensure that public funds are not used to support such programs. (387 F. Supp. at 1287-88.)

These passages from the Findings of Fact and the Opinion raise the most serious issues about the power and the proper criteria for the federal district courts to employ when resolving controversies that involve the No Establishment Clause and religious studies programs in higher education. The *amici* filing this brief urge this Court not to affirm this part of the district court's decision and not to pass over the question in silence. At the very least, the decision of the appellees not to cross-appeal on this point should be noted by this Court in its opinion and the question reserved.

There can be no question of the *power* of the district court to determine whether the courses in religion at the appellee colleges were academic or sectarian in character. If taxpayers in Maryland brought suit challenging courses in religion at the University of Maryland, the federal district court would have to resolve the suit on the merits. It could not simply presume that the courses were offered in a truly academic manner because they were offered at a state university. Similarly, since there was a full trial in the instant case, the district court was under a duty to decide the factual issues on the basis of the evidence before it—a decision

that the trial court refused to make. 387 F. Supp. at 1297, fn. 9.

The district court had no difficulty in determining that the appellee colleges "are characterized by a high degree of institutional autonomy" and that the affiliated churches "exercise no control over the budget or policies of the schools." 387 F. Supp. at 1287, fn. 7. The district court also determined that each of the appellee colleges "admitted students and hired faculty who were not members of the affiliated church" and that none of the appellee colleges required attendance at religious services. 387 F. Supp. at 1287. It certainly was not beyond the power of the district court also to resolve the issue whether the courses in theology and religion were academic or sectarian.

Much of the difficulty of the district court lay in the criteria it considered relevant. Apparently the district court was concerned by the fact that each of the appellee colleges "has as a secondary purpose the encouragement of the spiritual development of the students," even though the court found that "at none of these schools does this encouragement go beyond providing opportunities for religious experience." 387 F.Supp. at 1290. The district court was satisfied that each of the appellee colleges was autonomous, staffed by faculty hired on the basis of academic merit, nondiscriminatory in admissions, enjoyed academic freedom, taught all its courses in accordance with their requirements as academic disciplines, and did not have religious indoctrination as a purpose—but the court was still concerned about the "possibility" that the religion courses could be devoted to "deepening religious experiences" rather than to teaching theology or religion as an academic discipline.

The short answer to the district court's concern is that higher education is not a sterile, abstract exercise of the intellect. If a student, as a result of studies in history, literature, art, philosophy or religion, moves into a deeper examination of his own beliefs and values, the natural result in many cases will be the student's own personal decision to reject, modify or reaffirm those beliefs and values. The college acts as a catalyst, not a catechist. The possibility that the student may make a decision in accord with the beliefs and values of the church that is affiliated to some degree with the college does not turn the college into a sectarian tool of the church.

The deepening of religious experience is an important educational objective even when the educational institution has no concern whatever with the ultimate religious choice of the student.[20] Helping students to an awareness in the heart as well as in the mind of what religion has meant in human experience will result in a far greater understanding by the student of his fellow men. It is a grave mistake to believe that higher education consists only in filling the brains of students with scientific, statistical and historical data. It is also a function of higher education to awaken students to experiences that have been significant in human history. The deepening of religious experience is in no sense incompatible with the academic study of religion.

The district court was also troubled by the "limited array" of the theology and religion courses at the

[20] As Dr. Magill testified at the trial, the academic objective of religious studies is understanding, and understanding is more than mere knowledge about religion. Understanding involves a perception and appreciation of religious experience—an empathy—regardless of the ultimate personal stance individual students may take on religion. Tr. 1653-54.

appellee colleges. At the trial, Dr. Magill gave uncontradicted testimony that the catalog descriptions and range of religious studies at the appellee colleges

> . . . represent the kind of approach to the study of religion that one would find in any self-respecting quality institution. And they represent, I would say, a range of course content that is quite acceptable. They vary considerably from institution to institution, but I would say that they are not at all atypical, when you take a look at the entire spectrum of American undergraduate education. (Tr. 1645.)

Without saying so explicitly, the district court seems to have subscribed to the theory that the way to make the study of religion academic is to offer a broad range of courses covering as many religions as possible. To impose such a requirement makes it impossible for a small or medium-sized college to engage in the academic study of religion. Many factors enter into a faculty's decisions about the content of a college curriculum. Among these are the resources of the college, available teachers, the rights of tenured teachers and the degree of student interest in particular subject matter. The district court found that the affiliated churches "exercise no control over the budget or policies of the schools." 387 F. Supp. at 1287, fn. 7. Absent a showing of church control of the curriculum, there was no reason for the district court to doubt the good faith and judgment of the faculty about the proper curriculum for the colleges to offer in religion and theology.

Another factor the district court mentioned as causing the "possibility" of a sectarian dimension in the religious studies programs at the appellee colleges was that the courses were taught, at least for the most

part,[21] by members and clergymen of the churches affiliated with the colleges. The choice by the colleges of such teachers has many legitimate explanations, and it was error for the district court to give such great weight to the possibility that these teachers might be missionaries masquerading as professors. Judging the academic character of religious studies by the religious affiliations of the faculty members is dangerous business and tends towards the absurd result that the study of religion will be academic only when none of the professors in the department believe in anything they are teaching.

The most fundamental error of the district court, however, lay in its shifting of the burden of proof to the defendants on the issue of the academic character of their religious studies. In *Hunt* v. *McNair,* Mr. Justice Powell stated for the Court:

> Although the record in this case is abbreviated and not free from ambiguity, the burden rests on appellant to show the extent to which the College is church-related, cf. *Board of Education* v. *Allen,* 392 U.S. at 248, and he has failed to show more than a formalistic church relationship. As *Tilton* established, formal denominational control over a liberal arts college does not render all aid to the institution a violation of the Establishment Clause. So far as the record here is concerned, there is no showing that the College places any special emphasis on Baptist denominational or any other sectarian type of education. As noted above, both the faculty and the student body are open to persons of any (or no) religious affiliation. (413 U.S. at 746, fn. 8.)

[21] One of the appellee colleges, Loyola College, has a rabbi on its faculty in the religious studies department.

Exactly the same situation obtains in the instant case. The district court should have resolved all ambiguities against the appellants, not against the appellees, especially since the district court determined that the appellee colleges fully met the *Tilton* and *Hunt* criteria. Appellants had ample opportunities through discovery procedures to amass evidence, if any existed, that the study of religion at the appellee colleges was sectarian, not academic. All the appellants were able to do was to induce the district court to say that a "possibility" existed. Such a possibility does not satisfy the appellants' burden of proof. As Chief Justice Burger said in his opinion in *Tilton* v. *Richardson:*

> A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement. There is nothing new in this argument. But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional. (403 U.S. at 679.)

The district court's concern about the possibility of some secondary sectarian dimension in the religion courses at the appellee colleges was not a sufficient warrant for excluding those courses from public support under the Maryland law.

The district court noted that "[t]heology or its equivalent is a required course at each school." 387 F. Supp. at 1288. This requirement, however, derives from the fact that each of the appellee colleges is a liberal arts institution, and that the academic study of religion is an essential part of a liberal arts education. Such education is aimed at opening the student to the entire range of human experience. So long as the

study is truly academic, there can be nothing unconstitutional about requiring students who have elected such education to take religion or theology courses.

CONCLUSION

For the reasons stated, the Association of American Colleges and the other *amici* filing this brief urge this Court to affirm the judgment below, but without the restriction against the use of public funds for the support of the religious studies programs at the appellee colleges. If, however, the Court deems it inopportune to modify the judgment below in this case, these *amici* urge the Court explicitly to note the decision of the appellees not to cross-appeal with respect to the prohibition, and explicitly to reserve the question whether the prohibition was necessary and correct.

Respectfully submitted,

CHARLES M. WHELAN
Fordham Law School
New York, New York 10023
Attorney for Amici Curiae

OCTOBER TERM, 1976

No. 76-

JOHN C. MOSTER, III, EDWARD E. DUPEN,
KENNETH A. STEVENS, AND CYNTHIA LEONOR MILLER,
Appellants,

v.

THE BOARD OF ELECTIONS OF THE STATE OF MARYLAND,
ROBERT B. WATTS, JOHN F. COLLINS, J. CHESTER
CHAMBERS, JR., AND ROBERT J. MUNSON,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MARYLAND

BRIEF FOR NATIONAL CAMPAIGN FOR FULL
EDUCATION AND FEMINIST LEADERS
AMICUS CURIAE

LEO PFEFFER
Attorney for Amicus Curiae
16 East 66th Street
New York, New York 10021
Tel. No. (212) 570-4830

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 730

JOHN C. ROEMER, III, EDWARD E. DOERR, KENNETH A. STEVENS, AND CYNTHIA KOONCE MILLER,
Appellants,

–v.–

BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND; MARVIN MANDEL, GOVERNOR; LOUIS L. GOLDSTEIN, COMPTROLLER; JOHN A. LUETKEMEYER, TREASURER; COLLEGE OF NOTRE DAME OF MARYLAND, INC.; MOUNT SAINT MARY'S COLLEGE; SAINT JOSEPH COLLEGE AT EMMITSBURG, MARYLAND, INC.; AND THE ASSOCIATED PROFESSORS OF LOYOLA COLLEGE IN THE CITY OF BALTIMORE, INC., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF FOR NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, *AMICUS CURIAE*

INTEREST OF THE AMICUS CURIAE

The National Coalition for Public Education and Religious Liberty* is, as its name indicates, an unincorporated association of organizations concerned with the preservation of the nation's public educational system and the First Amendment's dual principle of religious liberty and the separation of church and state.

"Designed," as Mr. Justice Frankfurter noted,[1] "to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people," our public school system rests on three fundamental principles of universality—universality of control, of access and therefore of support. The public school system is controlled by all of the public, even by those whose children do not attend it.[2] It is open to all; it may not exclude children whose parents are too poor to pay taxes any more than those whose parents are wealthy enough to pay tuition at private schools. It may not exclude children

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* *Participating Organizations:* American Civil Liberties Union; ACLU of Connecticut; American Ethical Union; American Humanist Association; American Jewish Congress; Americans United for Separation of Church and State; Baptist Joint Committee on Public Affairs; Central Conference of American Rabbis; Illinois PEARL; Minnesota Civil Liberties Union; Missouri Baptist Christian Life Commission; Missouri PEARL; New York PEARL; Monroe County, New York PEARL; Nassau-Suffolk PEARL; Michigan Council Against Parochiaid; National Association of Laity; National Council of Jewish Women; National Education Association; National Women's Conference, American Ethical Union; Preserve Our Public Schools; Public Funds for Public Schools of New Jersey; New York State United Teachers; Ohio Free Schools Association; Union of American Hebrew Congregations; Unitarian Universalist Association.

[1] *McCollum v. Board of Education*, 333 U.S. 203, 216 (1948) (concurring opinion).

[2] *Kramer v. Union Free School District*, 395 U.S. 621 (1969).

because of their race,[3] religion,[4] political beliefs,[5] or because their standards of behavior or intellectual achievement may be below those the school authorities would like to maintain. And because it may not close its doors to any of the public, it is constitutionally entitled to financial support out of taxes imposed upon all of the public, even those who have no children or elect to send their children to nonpublic schools. The constituent organizations of the *amicus* and their members believe that division of tax-raised funds between public and nonpublic schools presents a threat to the integrity of public education.

They are no less concerned with the integrity of the mandate of religious freedom and the separation of church and state in the First Amendment to our Constitution. They believe that by protecting religion against the intrusion of civil authority and by making it impossible for the state to become a battleground for sectarian preference and favor, the First Amendment has preserved both our political freedom and our religious freedom. As this Court noted in *Lemon v Kurtzman*, 403 U.S. 602, 622 (1971), "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."

Because of this dual concern, the constituent organizations have participated as parties or as *amici curiae* in many of the cases which have involved the issue of governmental financing of religious schools on the elementary and secondary school level, and some of them also on

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[3] *Brown v. Board of Education*, 347 U.S. 483 (1954).

[4] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *McCollum v. Board of Education*, 333 U.S. 203 (1948).

[5] *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

the higher education level. While the case now before the Court involves only the latter, the *Amicus* agrees with the majority of the Court in *Lemon v. Kurtzman* and *Tilton v. Richardson*, 403 U.S.672 (1971), that there is no basic difference in the First Amendment principles applicable to aid to religious education schools at any level.[6]

Accordingly, *Amicus* has sought and obtained the consent of the parties to this case to the submission of this brief.

THE NATURE OF THE ACTION

This is a suit by taxpayers challenging the constitutionality under the First and Fourteenth Amendments to the United States Constitution of a Maryland statute appropriating public funds for outright grants to eligible colleges and universities. (The text of the statute, Annotated Code of Maryland, Article 77A, Secs. 65–69, as amended, is set forth in the appendix to the Jurisdictional Statement at A. 52–56.) All State-accredited, nonprofit private colleges and universities, other than those "awarding *only* seminarian or theological degrees," are eligible to receive the funds. (Sec. 66. Emphasis added.) The statute, as amended, provides that "[n]one of the moneys payble under this subtitle shall be utilized by the institutions for sectarian purposes." (Sec. 68A.) There is nothing in the statute, however, that excludes sectarian institutions, no matter how sectarian they may be, so long as they do not limit themselves to awarding only seminarian degrees.

[6] Simultaneously with the Court's decision in *Lemon v. Kurtzman* (hereinafter *Lemon*), *Tilton v. Richardson*, and *Earley v. DiCenso*, 403 U.S. 602 (1971), the Court remanded *Kervick v. Clayton*, 403 U.S. 945 (1971) and *Hunt v. McNair*, 403 U.S. 945 (1971); both involving aid to church related colleges, for reconsideration in light of the Court's decisions in *Lemon*, *Tilton* and *DiCenso*.

The District Court, over the dissent of Senior Circuit Judge Bryan, held that while the statute was unconstitutional as originally enacted, the fatal defect was eliminated by the 1972 amendment forbidding use of appropriated funds for sectarian purposes.[7] Accordingly, the statute was declared constitutional on its face and as applied, and the application for an injunction against its enforcement was denied. (Jurisdictional Statement, A. 25.)

THE QUESTION TO WHICH THIS BRIEF IS ADDRESSED

This brief is addressed to the single question whether public funds can be allocated as outright grants to sectarian or denominational colleges with no safeguards other than (a) exclusion of institutions which confer only seminarian or theological degrees, and (b) prohibition of utilization of the allocated funds "for sectarian purposes."

SUMMARY OF ARGUMENT

In *Tilton v. Richardson*, *supra*, and *Hunt v. McNair*, 413 U.S. 734 (1973) (hereinafter *Hunt*), the Court refused to hold unconstitutional on their face statutes appropriating public funds to finance in part the erection of facilities on church-related college premises to be used exclusively for secular purposes. In the present case, the majority of the court below did what this Court carefully avoided doing in those cases, namely, extend its ruling to encompass all-purpose grants to all church-related colleges and universities, no matter how sectarian they may be in ownership, control, operation and purpose. The court

[7] On authority of *Lemon v. Kurtzman*, 411 U.S. 192 (1973); the majority held that the sectarian institutions which had received funds prior to the amendment should not be required to refund to the State the moneys so received. Jurisdictional Statement, A. 25.

below recognized that there was some distinction between construction grants and all-purpose "non-categorical" grants, but held that the "distinction does not rise to constitutional dimensions." Jurisdictional Statement, A. 17.

The court below was in error. Dangers to First Amendment interests are implicated to a substantially less extent in construction grants than in all-purpose funding. The factors which impelled this Court to invalidate on their face all post-*Tilton* grant statutes other than for construction of facilities require a similar determination in the present case. This is particularly so in view of the fact that all these cases involved categorical or specific grants, and some of them were grants not made directly to the sectarian institutions but to the pupils or their parents. Certainly no less strict a standard can be applied when, as in the present case, the grant is non-categorical and is made directly to the sectarian institutions.

ARGUMENT

POINT I. A law providing direct all-purpose grants of tax-raised funds to sectarian educational institutions at the college no less than at lower levels violates the Establishment Clause of the First Amendment and is unconstitutional on its face.

A. *The Post-Tilton Decisions*

Before *Tilton*, the Court upheld two statutes granting funds benefitting sectarian schools; in both, the grants were to pupils or their parents rather than to the schools, and in both they were for a single specified purpose. In *Everson v. Board of Education*, 330 U.S. 1 (1947), it sustained a grant to finance bus transportation to parochial schools, and in *Board of Education v. Allen*, 392 U.S. 236 (1968), it sustained a grant to finance the

purchase of secular textbooks loaned to pupils attending nonpublic schools. With *Allen*, the Court called a halt. It made its intention clear in *Lemon*, and reiterated it in *Sloan v. Lemon*, 413 U.S. 825 (1973); where it said (at 832):

> . . . Such benefits [as allowed in *Everson* and *Allen*] were carefully restricted to the purely secular side of church-affiliated institutions and provided no special aid for those who had chosen to support religious schools. Yet such aid approached the "verge" of the constitutionally impermissible. . . . In *Lemon* we declined to allow *Everson* to be used as the "platform for yet further steps" in granting assistance to "institutions whose legitimate needs are growing and whose interests have substantial political support". . . . *Again today we decline to approach or overstep the "precipice" of establishment against which the Religion Clauses protect.* Citations omitted. Emphasis added.)

Beginning with *Lemon*, the Court showed by its decisions that it meant what it said in that case. Other than the two construction grant cases, *Tilton* and *Hunt*, it struck down every effort to apply tax-raised funds for the use of sectarian or denominational educational institutions.

In *Lemon*, it invalidated a purchase-of-services statute financed out of the proceeds of horseracing.

In *Sanders v. Johnson*, 403 U.S. 955 (1971), it affirmed without opinion a District Court decision (319 F. Supp. 421) holding unconstitutional a purchase-of-services statute financed out of the general treasury.

In *Earley v. DiCenso, supra*, it held unconstitutional a salary supplement law.

In *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); it ruled invalid a statute providing tuition payments for low-income families.

In *Sloan v. Lemon, supra*, it invalidated a tuition reimbursement law.

In *Essex v. Wolman*, 409 U.S. 808 (1973), it affirmed without opinion a District Court decision (342 F. Supp. 399) ruling unconstitutional a general tuition grants law.

In *Nyquist*, it struck down a law providing tax benefits for parents whose children attend parochial schools.

In *Grit v. Wolman*, 413 U.S. 901 (1973), it affirmed without opinion a District Court decision (353 F. Supp. 744) invalidating a law providing tax credits for such parents.

In *Nyquist*, it held unconstitutional statutory maintenance and repair grants to parochial schools.

In *Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472 (1973), it nullified statutory grants to pay for law-mandated services performed in parochial schools.

In *Donahey v. Protestants and Other Americans United for Separation of Church and State*, 403 U.S. 955 (1971); it denied a petition for certiorari to review a Court of Appeals decision, *Protestants and Other Americans United for Separation of Church and State v. United States*, 435 F. 2d 627 (1971), holding that, notwithstanding *Allen*, a substantial Federal question requiring the convening of a three-judge court was presented in an attack upon the textbook title of the Elementary and Secondary Education Act of 1965.

In *Brusca v. State Board of Education*, 405 U.S. 1050 (1972), it affirmed a decision (332 F. Supp. 275) holding that exclusion of parochial schools from tax-funding of education did not violate any constitutional rights of parents sending their children to such schools.

In *Franchise Board v. United Americans*, —— U.S. ——, 95 S. Ct. 166 (1974), it affirmed a District Court decision invalidating a statute providing tax reductions for parents of parochial school pupils.

In *Luetkemeyer v. Kaufmann*, —— U.S. ——, 95 S. Ct. 167 (1974), it affirmed a decision upholding a Missouri law limiting free transportation to pupils attending public schools.

Finally, in *Marburger v. Public Funds for Public Schools*, — U.S. ——, 94 S. Ct. 3163 (1974), it affirmed a District Court decision (358 F. Supp. 29) holding unconstitutional a New Jersey statute providing auxiliary services, textbooks, instructional materials and instructional equipment to private and parochial schools.

Two aspects of these decisions are of particular significance to the determination of the present case. First, with the exception of *Earley v. DiCenso* and *Levitt v. Committee for Public Education and Religious Liberty*, all the cases were decided without a trial record; in each case, the Court held that the challenged statute was unconstitutional on its face. Second, in every case involving, as the present case does, a direct grant of funds to sectarian schools, the challenged statute limited use of the funds for a specified, secular purpose, obviously recognizing that an all-purpose grant could not pass constitutional muster. In the light of the second factor, it is difficult to see how the majority of the court below could reach the conclusion that

the difference between construction and all-purpose grants "does not rise to constitutional dimensions."

B. *Tilton* and *Hunt*

The reliance of the majority of the court below was solely on *Tilton* and *Hunt*. It could hardly be otherwise; in view of the quotation above from *Sloan v. Lemon*, the majority could not rely on the single-purpose, carefully circumscribed grants upheld in *Everson* and *Allen*, and all the other challenged statutes had been declared unconstitutional by this Court. It is therefore necessary to examine into what *Tilton* and *Hunt* actually held.

Tilton involved a suit challenging the inclusion of sectarian colleges in the Higher Education Facilities Act of 1963. That law provided Federal construction grants for college facilities, public and private, except facilities to be used for sectarian instruction or religious worship, or which were part of a school or department of divinity. (It should be noted that in this respect the Federal act is more stringent than Maryland's. Under the former, a grant could not be made to finance facilities used even for secular purposes so long as they were part of a school or department of divinity. Under the latter, they could be used for secular purposes so long as the school confers at least one degree in addition to a theological degree.)

The law also provided that, if the exclusion of use for sectarian instruction or religious worship were violated within twenty years of the grant, the government could recover the amount of the grant, but after that period the institution could use the facility for any purposes it wished, including religious purposes.

The Court unanimously held unconstitutional on its face that part of the act which allowed use of the governmentally financed facilities for religious purposes after twenty years. It could not be assumed, it held, that the facilities had no further substantial value after that period, and therefore allowing them to be used for religious purposes would violate the First Amendment's prohibition of governmental aid to religion. A majority of the Court, though unable to agree on a single opinion, held that the balance of the law was not unconstitutional on its face, and the plurality, after examining into the nature and operations of the four church-related institutions joined as defendants in the suit, determined that it was not unconstitutional as applied to them.

The plurality made it quite clear that it did not intend to immunize from judicial challenge construction grants to all church-related or denominational colleges; indeed, it noted that the governmental authorities that administered the act had themselves declared ineligible some such colleges (403 U.S. at 682). It held only that on the facts as produced at the trial the four defendant colleges were correctly held by the authorities and the lower court to be eligible.

In *Hunt*, the Court upheld the constitutionality of the South Carolina Educational Facilities Authority Act as applied to a specific Baptist college. The act empowered the State Authority to assist colleges, through the issuance of revenue bonds, in constructing facilities which were not to be used for sectarian instruction or religious worship. Neither the State nor the Authority was obligated, directly or indirectly, to pay the principal or interest on the bonds; the State's taxing power was neither pledged nor implicated; all expenses of the Authority were to be paid solely out of the revenues of the projects.

It is obvious that the relationship between the State and the college in *Hunt* was far less than in the governmental grants challenged in *Tilton*. On its face, it seems little more than an ordinary banking transaction, costing the State nothing and aiding the colleges only in that a lower rate of interest would have to be paid by them by reason of the fact that the income on the bonds would not be subject to income taxation. (413 U.S. at 738–39.) The Court could, therefore, have disposed of the case on the ground that the relationship did not implicate governmental aid to religion within the purview of the cases we have heretofore cited in this brief; indeed, this was exactly the ground upon which the New Jersey Supreme Court upheld the similar statute challenged in *Kervick v. Clayton*. (56 N.J. 523, at 530–31.)

This Court did not elect to do so. Instead, it examined into the fact situation as it had done in *Tilton* and reached the same conclusion in respect to the Baptist college as it had in respect to the Catholic colleges in *Tilton*. In their brief herein, appellants examine exhaustively into the nature and operations of the defendant colleges and, we suggest, demonstrate persuasively that none of them can pass constitutional muster under the guidelines set forth and applied in *Tilton* and *Hunt*. There is nothing we need add to appellants' analysis of the facts and therefore limit ourselves to consideration of the question why the Court did not declare the statutes challenged in *Tilton* and *Hunt* unconstitutional on their face as it had done in respect to all the other statutes in the cases we have cited.[8]

[8] Even in the two cases in which trial records were presented to this Court, *Earley v. DiCenso* and *Levitt v. Committee for Public Education and Religious Liberty*, it is clear that the Court held the challenged statutes unconstitutional on their face. A single opinion was written in *DiCenso* and *Lemon* although there was no trial record in the latter case, and in *Levitt* the Court's opinion made no reference to the trial record other than a brief statement to the effect that, just as the statute on its face did not require recipient schools to account for funds received from the State, so the stipulated facts show that they are not required to do so. 413 U.S. at 477–78.

C. *College Grants and Construction Grants*

In two ways the grants involved in *Tilton* and *Hunt* differ from those in all the other cases cited in this brief: (1) the former were to colleges and all the others to elementary and secondary schools, and (2) the former were for or in connection with construction of facilities whereas the others encompassed a wide variety of purposes. We submit that the educational level of the recipient institutions is constitutionally critical in respect to construction grants but not in cases of other types of grants and particularly not in cases of all-purpose grants.

That a construction grant to sectarian or denominational schools on the elementary or secondary school level is unconstitutional on its face is clear from the following quotation from *Nyquist*, a case decided without a trial record:

> . . . If tax-raised funds may not be granted to institutions of higher learning where the possibility exists that those funds will be used to construct a facility utilized for sectarian activities 20 years hence, *a fortiori* they may not be distributed to elementary and secondary sectarian schools for the maintenance and repair of facilities without any limitation on their use. If the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair. 413 U.S. at 776–77 (citations omitted).

It is true that, as noted in *Hunt*, "Mr. Chief Justice Burger's opinion for the plurality in *Tilton* placed considerable emphasis on the fact that the federal aid there approved would be spent in a college setting" (413 U.S. at 746), but in the light of the above quotation from *Nyquist*, the reason for this is quite obvious: had the construction grant been made to a religious school at the elementary or secondary level, it would have been adjudicated unconstitutional on its face.

There are many reasons supporting our suggestion that the fact that the recipients in *Tilton* and *Hunt* were colleges was not the constitutionally critical factor. We have already noted that on their appearances before this Court in 1971 *Hunt* and *Kervick v. Clayton* were remanded for reconsideration in the light of not only *Tilton* but also *Lemon* and *DiCenso*. We have noted, too, that in *Tilton* itself a majority of the Court deemed the Establishment Clause and its application to educational institutions equally determinative on the college and elementary and secondary school levels. We call the Court's attention to the emphasis in the plurality opinion in *Tilton* to the fact that what was involved there was "a one-time, single-purpose construction grant." Unlike the present case, there was, as the opinion emphasized, "no continuing financial relationships or dependencies, no annual audits, no government analysis of an institution's expenditures on secular as distinguished from religious activities. Inspection as to use is a minimal contact." (403 U.S. at 688.)

In *Hunt* the Court quoted from *Nyquists* to "reaffirm . . . the principles which govern" consideration of challenges to statutes as violative of the Establishment Clause, including what was before the Court in *Hunt*, aid to colleges. 413 U.S. at 741. Nothing in the Court's

opinion states or implies that colleges are exempt from the strictures of these principles.

The present case challenges all-purpose grants. Such grants, of course, can be used for salary payments. Yet, in *Tilton* the plurality opinion distinguished *Lemon* and *DiCenso* in that there "the state programs subsidized teachers, either directly or indirectly." 403 U.S. at 687.

The cases we have cited in this brief reveal some of "the ingenious plans for channeling state aid to sectarian schools"[9] which until now have proved to be vain efforts to get around the barrier of the Establishment Clause. We do not believe that this Court intended at any time to hold that not one nor several but all of the ingenious plans would be effective if the recipient institution were a college rather than an elementary or secondary school.

We conclude this Point of our brief by submitting that a statute authorizing all-purpose grants of government funds to sectarian or denominational educational institutions is unconstitutional on its face, whether the institution be at the college, secondary or elementary level.

Point II. The facial unconstitutionality of an all-purpose grant of government funds to a sectarian or denominational educational institution is not cured by a provision forbidding utilization of the funds for sectarian purposes.

We have argued the facial unconstitutionality of the Maryland statute as originally enacted because we cannot assume that the appellees would concede the point. We do, however, note that the court below has held just that. After finding that the defendant colleges qualified under

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[9] *Nyquist*, 413 U.S. at 785.

the *Tilton-Hunt* criteria, it nevertheless held that as enacted the challenged statute was unconstitutional on its face even as to them. The court said:

> The original version of this Act, passed in 1971, provided no restrictions on sectarian use of funds. Accordingly, the 1971 version was unconstitutional. As substantial funds were paid out in 1971 to the five schools, this Court must decide whether to order the recipient schools to refund the illegally paid funds to the State of Maryland. (Jurisdictional Statement, A–23.)

The majority of the court, however, reached the conclusion that the otherwise fatal defect was cured by the 1972 amendment which added Sec. 68A providing:

> None of the moneys payable under this subtitle shall be utilized by the institutions for sectarian purposes. (Jurisdictional Statement, A–54).

We respectfully submit that the majority was in error for the following reasons:

1. Except in the limited instances of construction of facilities, this Court has not previously held that a prohibition against sectarian use immunizes from constitutional challenge a grant of funds to a religious educational institution. Recognizing that an all-purpose grant would clearly be unconstitutional, State legislative and other authorities have sought to insulate the government subsidy from sectarian use.

The efforts of the Pennsylvania legislature to achieve this are described as follows in *Lemon:*

> There are several significant statutory restrictions on state aid. Reimbursement is limited to courses "present in the curricula of the public schools." It is further limited "solely" to courses in the following "secular" subjects: mathematics, modern foreign languages, physical science, and physical education. Textbooks and instruction materials included in the program must be approved by the state Superintendent of Public Instruction. Finally the statute prohibits reimbursement for any course that contains "any subject matter expressing religious teaching, or the morals or forms of worship of any sect." (403 U.S. at 610. Footnote omitted.)[10]

The Rhode Island legislature went even further. Teachers receiving salary supplements out of tax-raised funds could teach only subjects that were offered in State public schools, could use only teaching materials used in the public schools, and had to sign an agreement "not to teach a course in religion for so long as or during such time as he or she receives any salary supplements." 403 U.S. at 608.

The Connecticut statute invalidated in *Sanders v. Johnson, supra,* (Connecticut Public Act No. 791, Section 7) provided that "[n]o portion of the salary of any teacher in a nonpublic school who during the regular school day teaches any subject matter expressing religious teaching or instructs in religious or denominational tenets, doctrine or worship shall be reimbursable under this act."

In *Nyquist, Sloan v. Lemon, Essex v. Wolman* and *Grit v. Wolman,* all involving statutes seeking either through tuition rebates or tax benefits to reimburse parents of pupils attending religious schools for the tuition paid by them, the respective legislatures carefully limited the

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[10] In the omitted footnote the Court notes that Latin, Hebrew and classical Greek are excluded from the category of foreign languages, presumably because they could be used for religious purposes.

amount of reimbursement to sums not exceeding the portion of the tuition attributable to secular instruction.

None of these efforts proved successful. In each case the Court declared the challenged statute unconstitutional on its face. In none of them, moreover, were the grants made directly to the schools: in *Lemon*, *DiCenso* and *Sanders* they were made to the teachers, in the other cases to the parents of the pupils. Finally, in all of them the challenged law provided for single-purpose grants; none of them involved all-purpose grants, obviously more vulnerable to constitutional challenge than the former.

2. Insulation of the secular from the sectarian in an all-purpose grant is practicably impossible. In the best of faith and with the most scrupulous efforts to avoid use of any part of all-purpose grants for the support of sectarian instruction or religious worship, it is simply not feasible to achieve this.

The first part of the statute challenged in *Nyquist* provided funds for the maintenance and repair of non-public schools. There was no dissent to the Court's invalidation of this section of the statute. In this part of its opinion, which was concurred in by all the members of the Court, it said:

> . . . The grants, totaling $30 or $40 per pupil depending on the age of the institution, are given largely without restriction on usage. So long as expenditures do not exceed 50% of comparable expenses in the public school system, it is possible for a sectarian elementary or secondary school to finance its entire "maintenance and repair" budget from state tax-raised funds. No attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, *nor do*

> *we think it possible within the context of these religion-oriented institutions to impose such restrictions.* Nothing in the statute, for instance, bars a qualifying school from paying out of state funds the salary of employees who maintain the school chapel, or the cost of renovating classrooms in which religion is taught, or the cost of heating and lighting those same facilities. . . 413 U.S. at 774 (emphasis added).

An all-purpose grant obviously permits use of the funds to subsidize maintenance and repair, but as a practical matter how can the qualifying school avoid using part of it to pay the salaries of employees who maintain the entire school premises and facilities including the school chapel and the classrooms in which theology is taught, or to pay for the cost of renovating classrooms in which religion is taught, or to pay the cost of heating and lighting these facilities, or to pay for the removal of snow from the entrances of the entire premises? If the school installs an all-building air conditioner, how can it be shut off from classrooms while they are being used to teach religion? What can be done about elevators stopping at floors with classrooms used for religious teaching and others used only for secular instruction?

All-purpose use, of course, includes use to pay for the tuition of students. In *Nyquist*, *Sloan v. Lemon*, and *Essex v. Wolman*, the Court held that this cannot constitutionally be done if the educational institution to which the tuition is paid is religious. The reason for this ruling was that there is no way by which the tuition can be divided between the costs of religious and non-religious instruction.

Under the Maryland statute, the grants can be used to pay for telephone costs. But how can the telephone

communications be monitored and policed to exclude those relating to the school's divinity program or theological instruction?

What about equipment such as typewriters or computers or audio-visual aids such as projectors? And what about supplies such as examination booklets, typewriter ribbons, chalk, board erasers, etc.? How can the sectarian and nonsectarian use of these be separated?

Illustrations such as these can be multiplied almost indefinitely, but the ones we have chosen are enough to show that the 1972 amendment to the Maryland statute calls upon the recipients of tax-raised funds to do something which simply cannot be done if the funds are used to subsidize the operations of sectarian or denominational colleges, including theological seminaries which award a single non-divinity degree.

3. Even if the separation mandated by the 1972 amendment were feasible, it could be achieved only at the cost of governmental surveillance of the operations of the recipient schools and involvement in their administration which could only be characterized as excessive. In *Tilton*, the plurality held that surveillance and entanglement relating to a governmental grant for the construction of a specific facility in a non-divinity college was of manageable dimensions and less than constitutionally forbidden excessiveness. But this is a far cry from reaching the same determination in the case of all-purpose grants encompassing all the operations and all the facilities of sectarian or denominational colleges. Although *DiCenso* involved schools on the elementary and secondary level, what the Court said in that case is, we suggest, applicable no less in the present case:

> . . . The Rhode Island Legislature has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion—indeed the State here has undertaken to do so. To ensure that no trespass occurs, the State has therefore carefully conditioned its aid with pervasive restrictions.
>
> A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church.

In *Levitt v. Committee for Public Education and Religious Liberty*, *Nyquist*, and *Sloan v. Lemon*, the Court refused to accept cost accounting procedures to assure that the percentage of an institution's budget applicable to secular operations represented a sum at least equal to the amount of government funds received by it, and that therefore the grants did not advance religion. But even if the Court had ruled otherwise and had held that on-the-premises monitoring and policing could be dispensed with and a "statistical guarantee of neutrality" [11] be substituted therefor, the necessary government audit-

[11] *Nyquist*, 413 U.S. at 787.

ing of the books and operations of the recipient institutions would itself bring with it the excessive entanglement and administrative involvement which the Establishment Clause forbids. *Walz v. Tax Commission*, 397 U.S. 664, 674–75 (1970); *Lemon*, 403 U.S. at 621–22; *DiCenso*, 403 U.S. at 620. Again we quote from *DeCenso:*

> There is another area of entanglement in the Rhode Island program that gives concern. The statute excludes teachers employed by nonpublic schools whose average per-pupil expenditures on secular education equal or exceed the comparable figures for public schools. In the event that the total expenditures of an otherwise eligible school exceed this norm, the program requires the government to examine the school's records in order to determine how much of the total expenditures is attributable to secular education and how much to religious activity. This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches. The Court noted "the hazards of government supporting churches" and we cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses. *Ibid.* (Citation omitted.)

In *Tilton*, the plurality expressed the view (obviously shared by four other members of the Court) that for a grant to colleges to be upheld under the Establishment Clause there must be "no continuing financial relationships or dependencies, no annual audits, no government

analysis of an institution's expenditures on secular as distinguished from religious activities" (403 U.S. at 688). Obviously, the grant challenged herein does not meet that test.

Conclusion

Whatever may be the case in respect to a single-purpose grant to a sectarian or denominational college, a statute providing all-purpose grants to such schools violates the Establishment Clause and its invalidity is not negated by the presence of a clause or sentence forbidding use of the granted funds for sectarian purposes. Accordingly, the judgment of the District Court should be reversed and the Maryland statute declared unconstitutional on its face.

Respectfully submitted,

LEO PFEFFER
Attorney for *Amicus Curiae*
15 East 84th Street
New York, N. Y. 10028
Telephone No.: (212) 879–4500

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